Supreme Court, U.S.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

PROMISE DOE, JANE ROE, KIMBERLY C., RUSS C., and SMALL WORLD MINISTRIES, INC.,
Petitioners,

- v. -

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity, CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity, and LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jay Alan Sekulow*
Walter M. Weber
American Center for Law & Justice
1000 Thomas Jefferson St.N.W.
Suite 609
Washington, DC 20007
(202) 337-2273

Larry Crain
Kevin Theriot
American Center for Law & Justice
101 Westpark Dr.
Suite 250
Brentwood, TN 37027
(615) 376-2622

Francis J. Manion
New Hope Life Center,
ACLJ-New Hope
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

*Counsel of Record

Attorneys for Petitioners

144 pp

QUESTIONS PRESENTED

The State of Tennessee enacted a statute which retroactively opens previously confidential adoption records and prospectively prohibits the maintenance of fully confidential adoption records.

1. Does a statute which retroactively unseals previously private adoption records and prospectively prohibits the full confidentiality of adoption records violate petitioners' rights of familial, reproductive, and personal privacy?

2. Does a statute which retroactively unseals previously private adoption records and prospectively prohibits the full confidentiality of adoption records unduly burden a woman's constitutional right to full reproductive choice?

3. Does a statute which, in part, retroactively unseals previously private adoption records violate petitioners' rights to due process?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case. Promise Doe and Jane Roe are pseudonyms. Small World Ministries, Inc., is a not-for-profit corporation. It has no parent company or subsidiaries.

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DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity, CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity, and LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DECISIONS BELOW

The decision of the court of appeals affirming the denial of the preliminary injunction and dismissing petitioners' federal claims is reported as *Doe v.*

Sundquist, 106 F.3d 702 (6th Cir. 1997). The decisions of the court of appeals granting a stay of the mandate until April 1, 1997, and subsequently vacating said stay are unreported. The decision of the district court denying petitioners' motion for a preliminary injunction is reported as *Doe v. Sundquist*, 943 F. Supp. 886 (M.D. Tenn. 1996).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment in this case on February 11, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Tennessee statutes, both former and revised, governing adoption records are set out in Appendices F, G and H.

STATEMENT OF THE CASE

For over forty years, the State of Tennessee provided by statute that all records pertaining to adoptions would remain confidential and unavailable to third parties. Even adopted children could obtain access to such information only if, and to the extent that, they could make a showing of necessity. Tenn. Code Ann. § 36-1-131 ("necessary information . . . may be disclosed . . . upon a written motion") (emphasis added). Appendix H.

On May 15, 1996, the Tennessee legislature enacted Tenn. Code Ann § 36-1-101 et seq. ("the Act"), which retroactively opens adoption records. Hence, those who took part in the adoption process, in reliance upon a statutory promise of confidentiality, now face a unilateral breach of that promise by the State of Tennessee. Moreover, the Act prospectively prohibits fully confidential adoptions. Appendix F.

A. Statement of Facts

Petitioner Promise Doe (a pseudonym) is a twenty-four year old citizen and resident of Kentucky who is both an adopted person and a surrendering birth parent. In 1990, at age eighteen, she became pregnant out of wedlock. Upon learning that her unborn child

was some seven months along in gestation, she decided to surrender the child for adoption through a private adoption agency. During her surrender process Promise Doe was assured that, in keeping with then existing Tennessee law, her identity and all other personal information which she provided about herself would remain sealed and confidential. Affidavit of Promise Doe, Appendix K.

Petitioner Jane Roe (a pseudonym) is a citizen and resident of the State of Tennessee. In 1956, at age seventeen, she discovered she was pregnant. Ms. Roe was advised after her delivery that her child had died within hours after birth. Thirty-two years later, in 1988, she and her husband and two children were living in Cody, Wyoming, when she received a certified letter from the Tennessee Department of Human Services informing her that the department had received contact from an individual claiming the Ms. Roe was his birth mother. The letter requested identifying information which could be used to verify whether she was in fact the person's biological mother. Ms. Roe made the emotionally difficult decision in 1988 not to release identifying information about herself. Under the new Act, however, she no longer has a right to guard her anonymity. Nor will she be able to prevent the release of socially embarrassing and private information by the State. Affidavit of Jane Roe, Appendix I.

A similarly situated woman is Jane Doe, whose affidavit petitioners filed with the Sixth Circuit in support of a stay. Affidavit of Jane Doe, Appendix J.

Jane Doe, like Jane Roe, had a child out of wedlock. Jane Doe gave her child up for adoption. The Tennessee Department of Human Services contacted Jane Doe in 1993, and Jane Doe now fears the revelation of "the details of this tragic episode in my life" under the new Act.

Petitioners Kimberly C. and Russ C. are a married couple residing in Tennessee. They are adoptive parents of two children. It is their desire that the personal information contained in their adoption files be maintained under seal as was promised them by statute at the time they were required to disclose this information as part of the adoption process. Affidavit of Kimberly C. and Russ C., Appendix L.

Petitioner Small World Ministries, Inc. ("Small World") is a private, non-profit adoption agency licensed by the State of Tennessee. Under prior regulations of the Department of Human Services, Small World was required to keep confidential all records which it generated during the course of either a surrender or an adoption. Based on the then-existing adoption statutes and regulations, Small World gave assurances to its clientele that all of the information which they provided would remain under seal and that their anonymity and confidentiality would be protected. Under the Act, however, Small World is forced to provide any eligible person making a request access to this confidential information. Small World's predicament under the new Act is further compounded by the fact that many of the children it places come from other states. In all but

three states in the country, information obtained by an adoption agency during the course of a surrender must remain sealed, and Small World could face criminal penalties if it violates these provisions. Affidavit of James Savley, Appendix M.

Respondents are state officials charged with responsibility for enforcement of the Act.

B. Course of Proceedings

The Act was originally scheduled to take effect on July 1, 1996. Petitioners filed suit in federal district court challenging the Act as an unconstitutional infringement of their constitutional right to privacy under the federal and Tennessee constitutions. Petitioners sought a temporary restraining order to maintain the status quo pending their challenge.

The district court granted a TRO on June 27, 1996.

The district court subsequently denied a preliminary injunction on August 23, 1996. Petitioners promptly appealed, and on September 11, 1996, Judge Martin of the Sixth Circuit granted a temporary stay. A panel of the Sixth Circuit then granted a stay pending appeal on September 30, 1996. Appendix D. That stay remained in effect through the date of the Sixth Circuit's decision of February 11, 1997.

In its decision of February 11, 1997, the Sixth Circuit affirmed the denial of the preliminary injunction. Despite the interlocutory stage of the proceedings, the court of appeals proceeded to address the ultimate merits of the underlying lawsuit. The court dismissed petitioners' federal claims and declined to exercise supplemental jurisdiction over petitioners' state claims. Finally, the court vacated the stay pending appeal and remanded the case for proceedings consistent with its opinion. Appendix A.

Petitioners promptly moved for a stay of the mandate pending their pursuit of certiorari in this Court. Petitioners also moved for a stay of enforcement of the judgment (i.e., reinstatement of the stay of enforcement of the Tennessee statute) pending their pursuit of certiorari.

On February 24, 1997, the Sixth Circuit issued a new stay. The court granted a stay of the mandate until April 1, 1997, and the court also stayed enforcement of the judgment without specifying a date for expiration of the stay. Appendix B.

The State of Tennessee then moved the Sixth Circuit for reconsideration of its stay order.

On March 21, 1997, the Sixth Circuit granted the motion to reconsider, reversed itself, and vacated the stay previously granted. Appendix C.

REASONS FOR GRANTING THE WRIT

In its decision dismissing petitioners' federal claims the court of appeals gave short shrift to the shattering impact on women and their families that will inevitably follow the sudden, unanticipated revelation of secrets long thought to be inviolate. The court of appeals utterly failed to appreciate the extent to which women and men, for decades, have relied upon the confidentiality of the adoption process in organizing their intimate relationships and making choices that define their views of their place in society. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L.Ed.2d 674, 701 (1992) (joint opinion). Moreover, the court of appeals simply did not grasp the significance of adoption confidentiality as a major factor for consideration by women exercising reproductive choice when faced with an unplanned pregnancy. By permitting the state to disclose the identity of and other personal information about a woman who chooses adoption (information which under this Court's abortion decisions the state must keep confidential where a woman chooses abortion) the Act impermissibly burdens a woman's choice and heavily skews that choice in one direction.

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH THIS COURT'S DECISIONS AND DECISIONS OF OTHER FEDERAL AND STATE COURTS ON FAMILIAL, REPRODUCTIVE, AND PERSONAL PRIVACY

A. The Act Infringes Upon Familial Privacy Rights in Violation of the United States Constitution.

The rights at stake in this case lie at the very core of the concept of familial privacy. As this Court has held, the freedom of the family and the marital relationship guaranteed by the United States Constitution "[w]ithout doubt . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

The Act invades this zone of privacy by permitting adoptees, their parents, siblings, lineal ancestors, and lineal descendants, to obtain access to "[a]ll adoption records." Tenn. Code Ann. § 36-1-127. This clearly violates the privacy rights of the biological parents who were promised by the State of Tennessee at the time they placed their children for adoption that all information would remain confidential and disclosed only by court order. *See*, Tenn. Code Ann. § 36-1-131 Appendix G.[1]

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[1]*See*, Affidavit of Promise Doe, Appendix K.

Most women who place their children for adoption are unwed mothers.[2] If the mother later marries, she may decide not to inform her husband about her child.[3] If an adoptee obtains information concerning his biological parents he may seek a meeting with one or both parents and may do so without notice. This confrontation could be disastrous for the biological parents' new family.[4]

The Act will also violate the familial rights of adoptive parents by permitting siblings of adopted children to obtain information. While the Act prohibits release of adoption files to the parents of adopted children under 21, it does nothing to prohibit an adoptee over 21 from sharing the information gained under the Act with siblings under 21.

The Act's attempted protection of privacy rights is insufficient to preclude constitutional violation. First,

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[2]*See* Levin, ***The Adoption Trilemma: The Adult Adoptee's Emerging Search For His Ancestral Identity***, 8 U. Balt. L. Rev. 496, 502 n.40 (1976) (suggesting that between 60-90% of adopted children are born to unwed parents).

[3]***See Mills v. Atlantic City Dep't of Vital Statistics***, 148 N.J. Super. 302, 311, 372 A.2d 646, 651 (Ch. Div. 1977) ("It is highly likely" that the natural parent of an adult adoptee will choose "not to reveal to his or her spouse ... the facts of an emotionally upsetting and potentially socially unacceptable occurrence of many years past").

[4]*See, e.g., id.* at 329; 372 A.2d at 655-56 (where the court reports the dissolution of one marriage following the adoptee's unexpected appearance).

it does nothing to prevent the disclosure of the identity of biological parents and the information they provided during the adoption process. Even though an adopted child may be prohibited from contacting biological parents, nothing in the Act prohibits the adoptee from disclosing the facts surrounding his birth and adoption to friends and acquaintances of the biological parents, as well as the community at large. Once the Pandora's box is opened and the petitioners' anonymity is lost, it can never be restored.

Moreover, there is no protection from contact by children placed for adoption for those parents who are unaware of this new statute and have not had the opportunity to file a contact veto. While the State is required to attempt to contact the parents to give them a chance to file a contact veto should they choose to do so, if the State is unable to locate them, no restrictions are placed on the ability of the adopted child to contact biological parents. Tenn. Code Ann. § 36-1-131(c).

The court of appeals declined to recognize the privacy rights of natural parents and adoptive parents in this context and expressed "skepticism that information concerning a birth might be protected from disclosure by the Constitution." *Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997). In so holding, the court below finds itself in conflict with the Second Circuit and several state courts which have not hesitated to recognize such a right. *See*, *Alma Society, Inc. v. Mellon*, 459 F. Supp. 912, 916 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 1225 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979) (state's interest

in protecting privacy of natural parents is an important interest and may be compelling); *see also*, *In Re Assalone*, 512 A.2d 1383, 1386 (R.I. 1986) (natural parents have a right to privacy, a right to be let alone which is constitutionally protected); *Bradley v. Children's Bureau*, 274 S.E.2d 418, 421 (S.C. 1981) (natural parents' expectation of privacy is constitutionally protected); *Dixon v. Dept. of Public Health*, 116 Mich. App. 763, 768-69, 323 N.W.2d 549, 551 (1982) ("It is the biological parents' right to privacy which is to be considered by the court. This broad term includes a range of positions from the desire not to be emotionally upset or socially embarrassed to a constitutionally recognized 'right to be let alone'.")

This Court should grant review to resolve the conflict between the holding of the Sixth Circuit in this case and the Second Circuit and the courts of Rhode Island, South Carolina and Michigan.

B. The Act Infringes Upon the Reproductive Privacy Rights of Biological and Adoptive Parents and Unduly Burdens a Woman's Right to Full Reproductive Choice.

The inability of biological parents to keep their identities secret under the provisions of the Act also violates their privacy rights by limiting their ability to choose to bear a child. "The right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973) (emphasis added). The

right of privacy includes the ability to make decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, free from interference by the government. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977). This right obviously extends to the choice to bear a child and place the child for adoption.

> If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original). Because parents rely on anonymity when deciding whether to carry a child to term and place the child for adoption, the Act will cause more parents to choose abortion, since their anonymity will be preserved by electing this alternative.[5]

The Act's intrusion upon the privacy of biological parents unconstitutionally burdens their decision

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[5]*Matter of Adoption of Spinks*, 32 N.C. App. 422, 427-28, 323 S.E.2d 479, 483 (1977) (the assurance of anonymity is an important consideration in the parents' decision to consent to the adoption of their child). *See also Massey v. Parker*, 362 So. 2d 1195, 1199 (La. Ct. App. 1978) (Schott, J., dissenting), *rev'd*, 369 So. 2d 1310 (La. 1979) ("a cavalier disregard for the mother's right of privacy might discourage adoption as a[n] . . . alternative to abortion"); *Kirsch v. Parker*, 375 So. 2d 693, 699 (La. Ct. App. 1979) (describing closed records statute as pro-adoption and anti-abortion).

whether to carry a child to term. The fact that the Act does not outright prohibit adoption does not render its infringement upon privacy rights a nullity. It is enough that the Act unduly burdens adoption by removing the cloak of anonymity once the child reaches the age of 21.

For instance, this Court has struck down statutes that limit access to abortion, but do not prohibit abortion out right. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (statute requiring spousal consent to abortion unconstitutional); *Doe v. Bolton*, 410 U.S. 179, 193-200 (1973) (restrictions on where and when abortions can be performed violated woman's right to privacy). In *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977), the Court held that a statute which restricted the sale of contraceptives was an unconstitutional burden on privacy rights because it made contraceptives less accessible.

Likewise, the disclosure of confidential or identifying information unconstitutionally deters protected decision-making in matters of child bearing or procreation. *Planned Parenthood v. Danforth*, 428 U.S. 52, 80 (1976). In fact, some of petitioner Small World's clients have already indicated that they would choose abortion rather than adoption because the Act prohibits them from remaining anonymous. *See* Affidavit of James Savley at ¶ 12, Appendix M.

In *Danforth*, the statute in question required physicians performing abortions to maintain records of all abortions they performed. The only provision which

saved the statute in *Danforth* was a shield of confidentiality surrounding the records. (The only person who had access to the records were public health officers.) The Court warned, however, that record keeping and reporting requirements must properly respect a patient's privacy.[6] These factors have led several courts to conclude that the disclosure of adoption information impinges upon a woman's constitutionally guaranteed freedom of choice.[7]

The Act improperly discriminates between the two decisions by stripping confidentiality from the adoption decision while maintaining confidentiality for the abortion decision. Under the Act a pregnant woman who wishes to maintain confidentiality about her condition must choose abortion; not adoption. Such a scheme smacks of coerced abortion, an atrocity this Court has rejected out of hand. *Planned Parenthood v. Casey*, 505 U.S. at 859. It would be most anomalous to hold that the state may impose burdens on adoption

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[6]A provision for confidentiality has been cited as a "crucial factor" for upholding the reporting requirements in *Danforth* and in other cases. *Comment, Planned Parenthood v. Danforth*, 1976 J.Y.U.L. Rev. 977, 994-95 (1976).

[7]*Alma Society, Inc. v. Mellon*, 601 F.2d 1225, 1231-33 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979); *Massey v. Parker*, 362 So.2d 1195, 1199 (La. Ct. App. 1978), *rev'd*, 369 So.2d 1310 (La. 1979); *Margeret S. v. Edwards*, 488 F. Supp. 181, 189 n.16 (E.D. La. 1980) (describing the cited cases as declarative of the constitutional privacy rights of the natural parent). *See generally, Notes, Sealed Adoption Records and the Constitutional Right of Privacy of the Natural Parent*, 34 Rutgers L. Rev. 451, 462-465 (1982).

which would never be tolerated as burdens on abortion. Surely abortion does not occupy a more exalted place in the Constitution than adoption.

In addition to the undue burdens the Act places on the birth mother, the impending threat of access to adoption records by the adoptee, his legal representative, or natural parents, siblings or lineal descendants or ancestors also has a detrimental effect on adoptive parents. The decision to adopt a child is as much a reproductive choice as is the decision to conceive through natural means. The purpose of adoption is to create a parent-child relationship, divesting all parental rights out of the biological parents, and vesting those rights in the adoptive parents.

Further, adoptive parents are required to disclose very private information in order to be considered for child placement. This information includes: psychological information relating to current or past mental or emotional stability; financial information about family assets, liabilities, and sources of income; details of personal lives dating back to childhood; information concerning parents and family background; confidential information about marriage relationships; and medical information and records from physicians. Affidavit of Kimberly C. and Russ C. at ¶ 5, Appendix L. The fact that the adoptee, or those to whom he grants consent, will have unlimited access to all of this information upon reaching the age of 21 has a decidedly chilling effect deterring individuals from becoming adoptive parents, *id.* at ¶¶ 6-10, thereby limiting their

choice to become parents and violating their privacy rights.

These crucial concerns were brushed aside by the court of appeals in conclusory fashion. This Court should grant review to allow full and fair consideration of the constitutional claims of these petitioners in light of this Court's privacy jurisprudence.

C. The Act Infringes Upon Confidentiality Privacy Rights in Violation of the United States Constitution.

Under Tenn. Code Ann. § 36-1-127(c), the adoptee has an unconditional right of access to the name and identifying information about his birth parents. While the parent may sign a contact veto prohibiting actual contact, there is absolutely no protection afforded the parent from the release of his name and other background information. Nor is there any limitation on the adoptee's dissemination of this information to others. All that is prohibited through the contact veto provision is the Act is actual contact.

This Court has recognized the protection of confidentiality as a distinct strand of the constitutional privacy right. A person has an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which invoked a constitutional challenge to a federal act that allowed the administration to take custody of the documents and

tape recordings accumulated by former President Nixon during his terms in office, the Court referred to the right of confidentiality. It held that Mr. Nixon's privacy rights extended to materials in which he had a "legitimate expectation of privacy," for example, those papers dealing with his familiar relationships or personal finances. *Id.* at 457.

Applying the rationale in *Nixon*, other courts, when faced with cases involving the release of confidential information, have based their decisions on whether the plaintiff has a legitimate expectation of confidentiality.[8] Other decisions have applied the zone of privacy rationale for determining whether the disclosure of personal information is protected under right of privacy. Thus, communications that pertain to "family, marriage, parenthood, human sexuality, and physical problems" have been held within the protected zone of privacy.[9]

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[8]*Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (state senators had legitimate expectation of privacy in their financial statements); *Martinelli v. District Court in & for City*, 612 P.2d 1083, 1092 (Colo. 1980) (remanding question to be determined by court in camera whether police officer had legitimate expectation of privacy in materials in personnel files); *Bryon, Harles, Schaffer, Reid & Associates v. State*, 360 So.2d 633 (Fla. 1980) (persons interviewed and evaluated by consulting firm of psychologists while conducting search for potential applicants for job had legitimate expectation of privacy in papers compiled).

[9]*See Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1038, 1043 (D. Hawaii 1979) (psychiatric records protected by confidentiality right); *Shuman v. Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979) (matters involving person's sex practices within

Regardless of which test is applied, the state-sanctioned disclosure of birth parent's names or identifying information without consent infringes upon their right to privacy. They have a reasonable expectation based on statutory assurances that their names and other identifying information will remain confidential. In 1990, when Promise Doe surrendered her child there were at least two Tennessee statutes which guaranteed that her identity and other confidential information which she had to disclose would remain sealed. Likewise, Jane Roe was informed by the State Department of Human Services in an October 26, 1988 letter requesting permission to release identifying information: "With a birth parent's written consent we may release identifying information regarding that parent." Jane Roe Affidavit, Appendix I. After much soul searching, Ms. Roe decided not to permit the release of this information, and has since relied on the State's assurance that her decision would not be nullified absent her written permission. Release of this type of information without permission is a serious encroachment on privacy rights.

The court of appeals incorrectly held that because the Act does not by its terms limit adoption any burden that does exist is "incidental." This Court should grant

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zone); *McKenna v. Fargo*, 451 F. Supp. 1355, 1380-81 (D.N.J. 1978) (information from psychiatric interview with protection of confidentiality right); *Fults v. Superior Ct.*, 88 Cal. App. 3d 899, 904, 152 Cal. Rptrs. 210, 213 (1979) (information dealing with one's sexual activity within zone of privacy).

review and reaffirm its longstanding commitment to the protection of individual privacy.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS ON THE CONSTITUTIONALITY OF RETROACTIVE LEGISLATION.

To the extent that the Act opens adoption records previously kept confidential by statute it is a classic piece of retroactive legislation. Such legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. ____, _____, 117 L.Ed.2d 328, 112 S. Ct. 1105 (1992). This Court has expressed grave reservations about the validity of retroactive legislation under the Due Process Clause because "[t]he legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Products*, 511 U.S. ___, 128 L.Ed.2d 229, 253, 114 S. Ct. 1483 (1994). And while the Court has frequently upheld retroactive legislation against due process challenges, *United States v. Hemme*, 476 U.S. 558, 90 L.Ed.2d 538, 106 S. Ct. 2071 (1986); *Welch v. Henry*, 305 U.S. 134, 83 L.Ed. 87, 59 S. Ct. 121 (1938); *United States v. Hudson*, 299 U.S. 498, 81 L.Ed. 370, 57 S. Ct. 309 (1937), the Court has long held that the validity of such legislation under the Due Process Clause depends upon whether "retroactive application is so harsh and oppressive as to transgress

the constitutional limitation." *Welch v. Henry*, 305 U.S. at 147, 83 L.Ed. 87, 59 S. Ct. 121, quoted in *United States v. Hemme*, 476 U.S. at 558-569, 90 L.Ed.2d 538, 106 S. Ct. 2071.

It would be difficult to imagine a piece of legislation whose retroactive application would be more unsettling, unfair, harsh and oppressive than the Tennessee Act unsealing previously confidential adoption records. The Act operates not upon mere economic interests but upon the most fundamental aspects of an individual's or family's life. Individuals and families who for nearly a half century have organized their intimate relationships and career choices in reliance on Tennessee's promise of secrecy now find themselves suddenly and unexpectedly exposed to disruption and anxiety of the deepest sort brought on by the Act's breach of that promise.

This Court should grant review to address the question whether a state legislature may, consistent with due process, enact a law which sweeps away citizens' legitimate expectations and tears apart the very fabric of their personal and social lives.

CONCLUSION

For the foregoing reasons, therefore, this Court should grant the petition for certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case at bar.

Respectfully submitted,

Jay Alan Sekulow*
Walter M. Weber
American Center for Law & Justice
1000 Thomas Jefferson St.N.W.
Suite 609
Washington, DC 20007
(202) 337-2273

Larry Crain
Kevin Theriot
American Center for Law & Justice
101 Westpark Dr.
Suite 250
Brentwood, TN 37027
(615) 376-2622

Francis J. Manion
New Hope Life Center,
ACLJ-New Hope
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

*Counsel of Record

Attorneys for Petitioners

May 12, 1997

APPENDIX

APPENDIX A

No. 96-6197
United States Court of Appeals
Sixth Circuit

Argued Dec. 2, 1996
Decided Feb. 11, 1997

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,

Plaintiffs-Appellants,

vs.

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,

Defendants-Appellees.

Before: MARTIN, Chief Judge; ENGEL and COLE, Circuit Judges. ENGEL, Circuit Judge.

Two birth mothers (Promise Doe and Jane Roe), an adoptive couple (Kimberly C. and Russ C.), and a nonprofit organization licensed by Tennessee as a child-placing agency (Small World Ministries, Inc.) appeal the district court's denial of their motion for a preliminary injunction to block the enforcement of Tennessee's new statute governing the disclosure of adoption records. The plaintiffs allege that the statute violates both the U.S. Constitution and the Tennessee Constitution. We affirm the district court's denial of the preliminary injunction, and on the merits of the case, we dismiss the federal claims and decline to exercise jurisdiction over the state claims.

I.

From 1951 to 1996, sealed adoption records were available in Tennessee only upon court order that disclosure was "in the best interest of the child or of the public." Tenn.Code Ann. § 36-1-131 (repealed). Under a recently enacted statute that was to go into effect July 1, 1996,

(A) All adoption records ... shall be made available to the following eligible persons:

(i) An adopted person ... who is twenty-one (21) years of age or older ...;

(ii) The legal representative of [such] a person....

(B) Information ... shall be released ... only to the parents, siblings, lineal descendants, or lineal

ancestors, of the adopted person ..., and only with the express written consent [of] the adopted person.... Id. § 36-1-127(c)(1). The new law also provides for a "contact veto," under which a parent, sibling, spouse, lineal ancestor, or lineal descendant of an adopted person may register to prevent contact by the adopted person. Id. § 36-1-128. The contact veto also can prohibit the adopted person from contacting any spouse, sibling, lineal descendant, or lineal ancestor of the person registering the veto. Id. § 36-1-130(a)(6)(A)(i). A violator of the contact veto provision is subject to civil and criminal liability. Id. § 36-1-132. Before disclosure of the identity of an adopted person's relatives is made, the state "shall conduct a diligent search" for the relatives to give them a chance to register for the veto. Id. § 36-1-131. In any event, the relatives of an adopted person can veto only contact, not disclosure of their identities.

Doe's birth child is approximately six years old. One of the adoptive children of Kimberly C. and Russ C. is no older than six, and the other is no older than two. Small World started in 1985, and apparently none of the children it has placed will turn twenty-one within the next few years. Roe's birth child is over twenty-one and has tried to ascertain her identity.

Six days before the statute was to go into effect, the plaintiffs filed this suit in district court. The court granted a temporary restraining order preventing state officials from enforcing the statute. On August 23, the court denied the plaintiffs' motion for a preliminary

injunction and motion to consolidate the preliminary injunction hearing with a hearing on the merits. The plaintiffs appealed, and a Sixth Circuit panel granted a stay prohibiting enforcement of the law pending an expedited appeal.

II.

[1] We review the district court's denial of a preliminary injunction for abuse of discretion. Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1480 (6th Cir.1995) , cert. denied, — U.S. —, 116 S.Ct. 1421, 134 L.Ed.2d 545 (1996) . The court evaluated the plaintiffs' motion under the proper framework, considering (1) the likelihood of success on the merits; (2) whether the plaintiffs would suffer irreparable injury without a preliminary injunction; (3) whether other parties would suffer substantial harm from a preliminary injunction; and (4) the public interest. Id.

The likelihood of success of the plaintiffs' constitutional challenge is the most hotly debated of the four factors. One obstacle in the plaintiffs' path is a potential lack of standing. The question of standing is subject to dispute, but we see no need to resolve it because even if the plaintiffs do have standing to contest the constitutionality of § 36-1-127(c), their challenge will almost certainly fail.

[2] The plaintiffs claim that the new law violates their right of privacy under the United States

and Tennessee Constitutions. They argue that the "zone of privacy" established in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) , now encompasses familial privacy, reproductive privacy, and privacy against disclosure of confidential information and that the new statute violates each of these three. We will consider these theories in turn, but first we note our skepticism that information concerning a birth might be protected from disclosure by the Constitution. A birth is simultaneously an intimate occasion and a public event--the government has long kept records of when, where, and by whom babies are born. Such records have myriad purposes, such as furthering the interest of children in knowing the circumstances of their birth. The Tennessee legislature has resolved a conflict between that interest and the competing interest of some parents in concealing the circumstances of a birth. We are powerless to disturb this resolution unless the Constitution elevates the right to avoid disclosure of adoption records above the right to know the identity of one's parents.

[3] First, the plaintiffs cite Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) , as protecting familial privacy. Dicta in Meyer noted that the Due Process Clause guarantees the right to "marry, establish a home and bring up children." Id. at 399, 43 S.Ct. at 626. Nothing in the Tennessee statute infringes on that right. Under the new scheme, people in Tennessee are still free not only to marry and to raise children, but also to adopt children and to give

children up for adoption. We find that if there is a federal constitutional right of familial privacy, it does not extend as far as the plaintiffs would like.

[4][5] Second, the plaintiffs claim that their right to reproductive privacy, as established in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) , and its progeny, is violated by the Tennessee statute. The freedom to make decisions about adoption, they argue, is sufficiently analogous to the freedom to decide whether to carry a baby to term to justify an extension of Roe. Even should it ultimately be held some day that the right to give up a baby for adoption or to adopt a child is protected by the Constitution, such a right would not be relevant to this case. Because the challenged law does not limit adoptions, cases striking down laws restricting abortions are not analogous. And even assuming that a law placing an undue burden on adoptions might conceivably be held to infringe on privacy rights in the Roe realm, much as laws placing "undue burden[s]" on abortions are unconstitutional under Planned Parenthood v. Casey, 505 U.S. 833, 874- 79, 112 S.Ct. 2791, 2818-22, 120 L.Ed.2d 674 (1992) , § 36-1-127 does not unduly burden the adoption process. Whether it burdens the process at all is the subject of great dispute in two briefs submitted to this court by amici curiae. Any burden that does exist is incidental and not "undue." See Casey, 505 U.S. at 878, 112 S.Ct. at 2821 (equating "undue burden" with "substantial obstacle").

[6] Third, the plaintiffs claim that the law violates their right to avoid disclosure of confidential information. They rely on a dictum in Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) , that describes one type of privacy right as "the individual interest in avoiding disclosure of personal matters." Id. at 599, 97 S.Ct. at 876. This right has not been fleshed out by the Supreme Court. The plaintiffs' argument that it should be extended to cover this case runs counter to our decisions in J.P. v. DeSanti, 653 F.2d 1080 (6th Cir.1981), and Doe v. Wigginton, 21 F.3d 733 (6th Cir.1994). In DeSanti, we read the Whalen dicta narrowly, 653 F.2d at 1088-89, and held that "the Constitution does not encompass a general right to nondisclosure of private information." Id. at 1090. We concluded that no constitutional right was violated by the post-adjudication dissemination of juvenile court records. Wigginton, which held that the disclosure of an inmate's HIV status was not unconstitutional, reaffirmed the nonexistence of the right claimed by the plaintiffs here. 21 F.3d at 740. The plaintiffs distinguish these cases by arguing that the information released in each did not implicate fundamental rights. As discussed above, even if a court were someday to recognize adoption-related rights as fundamental, such recognition would not be relevant to this case because the challenged part of the new Tennessee law does not directly regulate when, how, or by whom a child may be adopted.

The plaintiffs assert that the Tennessee Constitution provides broader protection of privacy

rights than does the U.S. Constitution. If this is so, see Davis v. Davis, 842 S.W.2d 588, 600 (Tenn.1992); Campbell v. Sundquist, 926 S.W.2d 250, 261 (Tenn.Ct.App.1996), plaintiffs present a cogent reason why resort should in all events first be made to Tennessee courts for the resolution of their dispute.

In their amended complaint, the plaintiffs also allege that § 36-1-127 violates their right to equal protection under the United States and Tennessee Constitutions, violates their right to freedom of conscience under the Tennessee Constitution, and constitutes a breach of contract by the state of Tennessee. The plaintiffs do not discuss these theories in their briefs on appeal. While they are entitled to what comfort they may obtain from Tennessee courts on the Tennessee claims, we find just as little likelihood of success under the federal equal protection theory as we do under the "right to privacy" theory.

In sum, we find that the plaintiffs' likelihood of success on the merits of their federal constitutional claims is so remote as to make the issuance of preliminary injunctive relief wholly inappropriate.

[7] The element of public interest also weighs against enjoining enforcement of the Tennessee statute. The statute appears to be a serious attempt to weigh and balance two frequently conflicting interests: the interest of a child adopted at an early age to know who that child's birth parents were, an interest

entitled to a good deal of respect and sympathy, and the interest of birth parents in the protection of the integrity of a sound adoption system. It is an issue of peculiar relevance to the primary police functions of the state as reserved to Tennessee under the Tenth Amendment. See United States v. Lopez, -- U.S. ---, ---, 115 S.Ct. 1624, 1634, 131 L.Ed.2d 626 (1995). Another aspect of public interest favoring the defendants' position is the interest of comity between states and federal governments, including the interest of the state in having the first opportunity to construe its own constitution and laws.

[8][9] We are mindful that even when a plaintiff's probability of success on the merits of a claim is not very high, a preliminary injunction may be appropriate if the plaintiff is in serious danger of irreparable harm absent an injunction. Thus we have observed that the degree of likelihood of success that need be shown to support a preliminary injunction varies inversely with the degree of injury the plaintiff might suffer. Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir.1982). We are particularly sympathetic to the plight of the Roe birth mother, whose identity may be disclosed imminently to her biological child if the statute is upheld. The likelihood of irreparable harm does not, however, control completely; other factors must still be weighed. Here the plaintiffs' ultimate chance of success on their federal claims is so slim as to be entirely ephemeral. We must observe also that the plaintiffs have always had the opportunity to present

their state claims to the Tennessee courts, and if there is any danger of loss in their having failed earlier to pursue that avenue, the cause of it lies in their own hands.

* * * * * *

[10][11][12] Normally, we limit our review of a district court's decision to grant or deny a preliminary injunction to a consideration of whether the district court abused its discretion, leave it at that, and remand to the district court for further proceedings. Tate v. Frey, 735 F.2d 986, 990 (6th Cir.1984). We generally decline comment on the merits of the case to the extent possible because we recognize that factual issues are fleshed out and legal issues are more fully argued once litigation passes the preliminary stage. Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1356 (6th Cir.1985); SEC v. Senex Corp., 534 F.2d 1240, 1241 (6th Cir.1976). This prudential limitation on appellate review goes hand in hand with the axiom that we do not consider issues not passed upon by the district court. Pinney Dock & Transport Co. v. Penn Cent. Corp., 838 F.2d 1445, 1461 (6th Cir.1988). That axiom is not jurisdictional, however. If an issue unaddressed by the district court "is presented with sufficient clarity and completeness and its resolution will materially advance the progress" of the litigation, id., we have often chosen to consider that issue, e.g., Allen v. Diebold, Inc., 33 F.3d 674, 676 (6th Cir.1994). The sort of judicial restraint that is normally warranted on

interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy. Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1370 (6th Cir.1977).

[13] We have never applied the Pinney Dock exception precisely to an appeal from the grant or denial of a preliminary injunction, but we find that the principle applies squarely to such a case when the legal issues have been briefed and the factual record does not need expansion. Other appeals courts have readily addressed the merits of cases on interlocutory appeal from the denial of a preliminary injunction. E.g., Illinois Council on Long Term Care v. Bradley, 957 F.2d 305, 310 (7th Cir.1992) ("Since plaintiffs cannot win on the merits, there is no point in remanding the case for further proceedings."); see also 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2962, at 434-35 (1995) ("If an interlocutory appeal is taken, the appellate court ... under unusual circumstances may dismiss the action if an insuperable obstacle to warding relief is apparent."). Indeed, the U.S. Supreme Court has noted that one purpose of interlocutory appeals is "to save parties the expense of further litigation." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 756, 106 S.Ct. 2169, 2176, 90 L.Ed.2d 779 (1986), overruled in part on other grounds by Planned Parenthood v. Casey, 505 U.S. 833, 870, 112 S.Ct. 2791, 2816-17, 120 L.Ed.2d 674 (1992). In Thornburgh, the Court approved of the Third Circuit's holding that several

provisions of a new Pennsylvania law were unconstitutional even though only the district court's denial of a preliminary injunction, not the merits of the case, had been before the court of appeals. Id. at 757, 106 S.Ct. at 2177. Although the advantage in deciding the merits of a case earlier may be slightly diminished when that decision is that a statute is not unconstitutional, the "rule of orderly judicial administration," id., invoked by the Court in Thornburgh applies here as well.

We remand to the district court to dismiss the plaintiffs' complaint with prejudice with respect to the federal constitutional issues but without prejudice to any right to seek relief from the Tennessee courts on the non- federal issues. From respect for the right of a state court system to construe that state's own constitution and adoption statute, we choose not to rule on the merits of the state claims. [FN1]

FN1. We recognize that this case lends itself in some ways to abstention under the doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), in which the Supreme Court held that if clarification of state law might obviate the need for a federal court to determine a federal constitutional question, the federal court should abstain until the state law question is settled. The federal constitutional questions in this case, however, are not so difficult that anything would be gained by dodging them. While we have the judicial power to resolve these issues, we may as well decide

them.

The district court had subject-matter jurisdiction over the state claims under 28 U.S.C. § 1367(a), which provides for supplemental jurisdiction over "claims that are so related to claims in the action within [original] jurisdiction that they form part of the same case or controversy...." A district court may decline to exercise supplemental jurisdiction over a claim if

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. § 1367(c).

[14] As the first tribunal to address the merits of this case, we do not sit in our usual procedural posture of reviewing the district court's exercise of supplemental jurisdiction for abuse of discretion. See Soliday v. Miami County, 55 F.3d 1158, 1164 (6th Cir.1995). We must decide ourselves whether to exercise such jurisdiction. We decline to exercise supplemental jurisdiction, finding that at least one of the § 1367(c) factors applies, namely, subsection (c)(1). Concerns of comity also support our decision. See Castellano v. Board of Trustees, 937 F.2d 752, 758

(2d Cir.1991). This case would have been better brought in state court in the first place, and we deem it prudent to allow the Tennessee courts to decide the purely state law issues.

III.

For the foregoing reasons, we AFFIRM the district court's denial of the plaintiffs' motion for a preliminary injunction. On the merits of the case, we DISMISS the plaintiffs' claims insofar as they rely on federal law, and we decline to exercise supplemental jurisdiction over the claims insofar as they rely on state law. The stay pending appeal is VACATED and the case is REMANDED to the district court for dismissal of the complaint and other proceedings consistent with the decision of this court.

APPENDIX B

No. 96-6197
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,

Plaintiffs-Appellants,

vs.

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,

Defendants-Appellees.

[Filed Feb. 24, 1997]

Before: CHIEF JUDGE MARTIN, ENGEL and COLE, Circuit Judge

Upon consideration of the motions filed by the appellants to stay the mandate pending the filing of a Petition for Writ of Certiorari.

It is ORDERED that the motion be, and it hereby is, GRANTED. The mandate is stayed until APRIL 1, 1997.

Upon further considering the appellants' motion to stay enforcement of judgment.

It is ORDERED that the motion be, and it hereby is, GRANTED.

Any further requests for stay must be directed to the Supreme Court of the United States.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

No. 96-6197
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,

Plaintiffs-Appellants,

vs.

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,

Defendants-Appellees.

[Filed Mar. 21, 1997]

Before: MARTIN, Chief Judge, ENGEL and COLE, Circuit Judges.

Upon consideration of the motions filed by the appellee and the amicus curiae to reconsider the order filed February 24, 1997,

It is ORDERED that the motions be and they hereby are GRANTED.

The stay previously granted is VACATED and the motion originally filed in support, thereof, is DENIED

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

No. 96-6197
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,

Plaintiffs-Appellants,

vs.

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,

Defendants-Appellees.

ORDER
[Filed Sep. 30, 1996]

Before: MARTIN, CONTIE, and BATCHELDER, Circuit Judges.

In this action challenging the constitutionality of T.C.A. § 36-1-127(c), a statute providing for limited disclosure of adoption records, the plaintiffs' appeal the denial of their motion for a preliminary injunction seeking to enjoin the defendants from enforcing that statute. The plaintiffs now move to stay the enforcement of T.C.A. § 36-1-127(c) pending this appeal. The defendants oppose the motion. Parties permitted to participate as amici curiae in the district court move for leave to file a response to the stay motion. The court hereby grants the motion and considers the amici curiae's response in opposition.

The district court denied a similar motion for a stay pending appeal on September 4, 1996. On September 11, 1996, this court granted a temporary stay to permit the consideration of the stay motion by a three-judge panel of the court.

The factors to be considered by the court in determining whether a stay or injunction pending appeal should issue are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injury the other interested parties; and 4) where the public interest lies. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These factors are to be balanced and are not prerequisites to be met. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1228-29 (6th Cir. 1985).

Upon review of the materials presented, we conclude that the motion for a stay pending appeal should be granted. The plaintiffs have raised questions with respect to the merits of the district court's ruling and have demonstrated irreparable harm. Although the defendants and the amici curiae argue that a stay may harm many individuals by depriving them of access to medical information contained in adoption records, state law provides for court-ordered release of information from adoption and sealed records upon a showing of medical need. *See* T.C.A. § 36-1-138. In order to minimize any harm or inconvenience cause by the stay, the court will consider the appeal on an expedited basis.

It therefore is **ORDERED** that the plaintiffs' motion for a stay is granted, and the enforcement of T.C.A. § 36-1-127(c) is stayed pending appeal. The motion of the amici curiae for leave to file a response to the stay motion is granted. The Clerk is directed to expedite the appeal for briefing and submission to the court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

No. 3:96-0599
United States District Court
M.D. Tennessee
Nashville Division

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,

Plaintiffs-Appellants,

vs.

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,

Defendants-Appellees.

[Filed Aug. 23, 1996]

MEMORANDUM:

JOHN T. NIXON, Chief Judge.

Pending before this Court is Plaintiffs' Motion for a Preliminary Injunction barring Defendants from unsealing and disclosing to any third persons confidential records contained in Plaintiffs' adoption files, which the State of Tennessee has in its custody. Doc. No. 79. Also pending before the Court is Plaintiffs' Motion to Consolidate the Preliminary Injunction Hearing with a Hearing on the Merits. Doc. No. 71.

The Court finds that Plaintiffs fail to meet the requisite standard of review to support a preliminary injunction, and therefore denies Plaintiffs' Motion for a Preliminary Injunction. The Court also denies Plaintiffs' Motion to Consolidate the Preliminary Injunction Hearing with a Hearing on the Merits.

BACKGROUND:

On May 15, 1996, the General Assembly of the State of Tennessee enacted Chapter 532 of the Tennessee Public Acts of 1996 ("the Act"). The Act includes a number of changes, which substantially alter certain aspects of adoption law in Tennessee. The new statute revises the process for obtaining access to the records of persons placed for adoption in the past. These records were sealed as a result of 1951 legislation which limited adoption record access to those adoptees who brought court proceedings and successfully demonstrated a compelling interest in accessing their sealed files. The 1996 Act would permit immediate access to the formerly sealed records for

adult adoptees, certain close relatives, and legal representatives upon the verification of those persons' identities. As a protective measure, the 1996 Act enables persons whose identities are sought to register for a veto prohibiting contact with themselves and their families without their approval. Enforcement of the "no contact" veto by the persons sought would be through civil injunctive and damages action. Violation of the veto can also result in criminal sanctions under the Act.

Plaintiffs in this case are Promise Doe and Jane Roe, women who had given children up for adoption under the prior statutory scheme, Kimberly C. and Russ C., the adoptive parents of two children who became part of the C. family under the previous legal framework, and Small World Ministries, a Tennessee adoption agency, which facilitated adoptions under the prior law. Plaintiffs bring suit against the following persons in their official capacities: Donald Sundquist, Governor of the State of Tennessee, Charles Burson, Attorney General of the State of Tennessee, and Linda Rudolph, Commissioner of the Department of Human Services for the State of Tennessee.

In their efforts to obtain injunctive relief, Plaintiffs challenge the portion of the 1996 Act which allows adult adoptees, certain of their close relatives, or their representatives to access formerly sealed files. Additionally, Plaintiffs take issue with the Act's prospective provisions which will allow adoptees, relatives and representatives to access sealed files in

the future as adopted children reach the age of majority. Plaintiffs contend that the challenged provisions of the Act violate their familial right of privacy under the United States Constitution, their legitimate expectation that their identities and identifying information would remain confidential, and their constitutional right of privacy under the Tennessee Constitution. Further, Plaintiffs maintain that the historical underpinnings of adoption law in the United States favor the preservation of privacy of adoption records, and that Defendants are estopped from breaching their promise to maintain the confidentiality of such records.

Defendants respond by arguing that a preliminary injunction is improper on the grounds that Plaintiffs are unlikely to succeed on the merits of their claim, Plaintiffs cannot show a probability of irreparable harm if an injunction is not granted, the issuance of an injunction will likely harm others, and the issuance of an injunction is contrary to the public interest.

Plaintiffs sought and obtained a Temporary Restraining Order enjoining enforcement of the Act on June 25, 1996. Doc. Nos. 2, 10. By agreed order the matter proceeded to a hearing regarding further injunctive relief, which took place on July 25, 1996. Doc. No. 11. After reviewing the exhibits filed with this Court and evaluating the testimony and arguments presented, the Court finds that the Plaintiffs fail to meet the requisite standard of review

to support a preliminary injunction. Accordingly, the Court denies Plaintiffs' Motion.

LEGISLATIVE HISTORY AND STATUTORY BACKGROUND:

The first discussion of adoption in Tennessee law appears in 1852 when the Tennessee General Assembly granted jurisdiction to the county and circuit courts authorizing the adoption of children on application. See 1852 Tenn.Pub.Acts, Chap. 338. At that time, the Court recorded the names of the parties and the terms of an adoption. Id. The first statutes addressing confidential adoption records appear in 1917 in connection with "foundlings or other abandoned children whose parentage is unknown, and who have not been assigned by court order to a child-caring organization." 1917 Tenn.Pub.Acts, Chap. 120, § 5, sub.sec. 4. The legislature indicated that a judge "in his discretion" could "require that all papers relating to the personal history of such child or family history if any is of record, be sealed and filed in the county archives, to be unsealed only by judicial order." Id.

In 1949, the Tennessee General Assembly amended the state's adoption statutes and sealed records of the adopted child's "real name," any information obtained by the Tennessee Department of Public Welfare in its investigation of the adoption petition, and any reports filed by the Department with the court. 1949 Tenn.Pub.Acts, Chap. 127 §§ 3, 5, and

6. However, the law also stated that "upon petition by an adopted person who is over twenty-one ...," a judge could require the department to deliver "the secret records relating to said adopted person" and the judge would open and inspect the records and release to the adopted person any contents as he "in his sound discretion" deemed to be in the best interest of the adopted person and to the State of Tennessee. Id. § 8. In 1951, the statute was again amended, and the legislature placed all adoption records under seal and forced adoptees seeking information to file a court order. 1951 Tenn.Pub.Acts, Chap. 202 § 24. Disclosure was predicated upon a court finding that it would be in the best interest of the adoptee or the public to have the information released. Id. at § 26. The current challenged proposals represent the first changes to the adoption law as amended since 1951.

Those proposals were generated by the Tennessee Adoption Law Study Commission (ALSC). In 1993, State Senator Douglas Henry co-sponsored Joint Resolution No. 17, which formalized the ALSC. Affidavit of Senator Douglas Henry, Doc. No. 77, p. 1. The state legislature created the Commission to study all aspects of Tennessee adoption law in order to revise, update, and clarify existing law. Id. The eleven member ALSC began its study in August 1993 and held a number of statewide public hearings soliciting public comment on the current adoption process and avenues for revision. Id., p. 3. The ALSC presented its recommendations to the Tennessee General Assembly in 1995, which led to the promulgation of the

Adoption law currently at issue.

When the challenged Adoption Reform law was introduced and first considered by the Tennessee General Assembly in 1995, several legislators expressed concerns over the bill's ability to adequately protect the privacy of the biological parents who entered into the adoption process. Affidavit of State Representative Carol J. Chumney, Doc. No. 89, p. 2. As a result of these concerns, the legislature delayed until July 1, 1996 the effective date of the portion of the bill dealing with confidential records for adoptions occurring subsequent to March 16, 1951. Additionally, the legislature formed a Joint Adoption Study Committee (JASC) to consider the adequacy of the privacy protection afforded by the bill. Id.

Subsequently, State Representative Carol Chumney, a member of the JASC, introduced legislation in the House, accompanied by companion bills in the Senate sponsored by Senators David Fowler and Doug Henry, to restore privacy protection for biological parents who entered into the adoption process after March 16, 1951. Id. at 3, 1. The Tennessee State Legislature's full House and full Senate Judiciary Committees voted in the spring of 1996 to revise the bill, heightening protection for adoptees or birth parents who did not wish to have their identities divulged. Id. at 4. The House reauthorized the prior mutual consent process for adoptions occurring between March 16, 1951 and July 1, 1996, and required an expanded contact veto

provision for adoptions finalized after July 1, 1996. Id. The revised contact veto allowed for the redaction of identifying information which could lead to unwanted contact or disclosure from confidential files requested by adoptees, birth parents, or their representatives. Id. The Senate Judiciary Committee endorsed an amendment that would have expanded the law's contact veto provisions to remove identifying information from confidential adoption files. Id.

However, the bill was subsequently assigned to the House Budget Subcommittee for consideration of its fiscal impact. Id. at 4-5. Although the Budget Subcommittee found the bill would result in a "not significant" increase in expenditure, the Subcommittee called for revision of the bill on the basis of its fiscal impact. Id. at 5. The Budget Subcommittee, for what appeared to Chumney to be fiscal reasons, ultimately scaled back the Judiciary Committee's proposed amendment increasing privacy protections. Id. The Budget Subcommittee agreed instead to an amendment creating a cause of action against persons who use confidential adoption information to harm someone and heightening privacy for those biological parents who were victims of rape or incest. Id., and see also Senate Bill No. 3099, Public Chapter 1068, Exhibit H., attached to Doc. No. 89. The General Assembly passed additional amendments clarifying access to records, and indicating that home studies and confidential records maintained by Crisis Pregnancy Centers, psychologists, and other professionals would remain confidential in the

absence of a court order. Brief Amicus Curiae of Senator Jim Holcomb, Representative Joe Fowlkes, Caprice East, Doc. No. 73, p. 8.

DISCUSSION:

[1] It is not a function of the courts to determine the wisdom of a statute. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194, 98 S.Ct. 2279, 2301-02, 57 L.Ed.2d 117 (1978). Thus, questions regarding the Tennessee General Assembly's prudence in failing to provide greater protection for birth parents and adoptees wishing to keep their identities confidential have no bearing on this Court's decision as to the appropriateness of a preliminary injunction.

In determining whether to grant a preliminary injunction, the Court must apply the following four factors: (1) the likelihood of the Plaintiffs' success on the merits; (2) whether or not the Plaintiffs will suffer irreparable injury if the preliminary injunction does not issue; (3) whether or not the injury outweighs the harm to other parties if the preliminary injunction is granted; and (4) whether the grant of a preliminary injunction is in the public interest. NAACP v. City of Mansfield, Ohio, 866 F.2d 162, 166 (6th Cir., 1989); International Resources, Inc. v. New York Life Insurance Co., 950 F.2d 294, 302 (6th Cir., 1991), cert. den., 504 U.S. 973, 112 S.Ct. 2941, 119 L.Ed.2d 565 (1992).

[2] In the current matter, Plaintiffs' request for

a preliminary injunction is based in large part on the argument that the Act is unconstitutional because it interferes with Plaintiffs' fundamental constitutional rights and it violates the Constitution's Equal Protection Clause. According to a recent decision of this Circuit, a facial challenge to the constitutionality of a statute must be rejected unless there exists no set of circumstances in which the statute can be constitutionally applied. Dean v. McWherter, 70 F.3d 43, 45 (6th Cir., 1995). Applying the four factors enumerated above, the Court finds that Plaintiffs' claims do not meet the requisite standard of review to support a preliminary injunction.

A. Likelihood of Success on the Merits:

1. Standing:

[3] Defendants argue that Plaintiffs lack standing to raise the issues presented in this action (Defendants' Memorandum in Opposition to Motion for Preliminary Injunction, Doc. No. 76). If Plaintiffs are without standing, clearly this Court cannot maintain jurisdiction over the dispute and an order to dismiss must be entered. Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 715 (6th Cir., 1995). The Court concludes that it would be precipitous at this time to dismiss Plaintiffs for lack of standing.

The Supreme Court has identified three requirements that plaintiffs must meet to establish

standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559- 561, 112 S.Ct. 2130, 2135-2137, 119 L.Ed.2d 351 (1992). First the party must assert that he or she has suffered an injury in fact. Id. The plaintiff's injury must be "concrete and particularized," affecting the plaintiff in an individual and personal way. Id. The injury must also be actual or imminent. Id. Plaintiffs cannot establish standing by merely showing the potential for future harm. Second, plaintiffs have standing only if there is a causal connection between the injury and the conduct they are challenging. Id. Third, standing will exist only if there is the likelihood that the injury will be redressed if the Court grants the relief requested. Id.

Defendants' primary challenge to the standing of Plaintiffs Promise Doe, Jane Roe, Kimberly C., and Russ C. is that these Plaintiffs have not suffered an actual injury. Rather, Defendants assert that these Plaintiffs are alleging only speculative, future injury. The children of Plaintiffs Promise Doe, Kimberly C., and Russ C. are all six years of age or less. Defendants argue that any injury these Plaintiffs may experience as a result of the Act will not be realized until at least the year 2011, a time too distant and an injury too speculative to create standing. Similarly, Defendants maintain that Jane Roe alleges only the potential for future injury.

[4] The Court determines, however, that injury to these Plaintiffs is immediate. Plaintiff Jane Roe has demonstrated a strong likelihood that her adult child

will access formerly confidential adoption records immediately after the enactment of the Act. Although the adoption records of the natural and adopted children of Promise Doe, Russ C. and Kimberly C. will remain closed until the children reach 21 years of age, these Plaintiffs face immediate injury as a result of psychological impact that future disclosure of adoption records will have on them and their families. The Court finds that the contact veto available to these Plaintiffs does not eliminate the emotional injury of fear and concern. There are few relationships, if any, in which emotional injuries are more real than in the relationship between parents (adoptive or biological) and their children. Accordingly, the Court finds that these Plaintiffs have established the existence of an injury in fact.

Further, the Court concludes that there is a causal connection between the Plaintiffs' injuries and the challenged Act. There is no doubt that under the 1996 Act, adoption records are more easily accessible to adopted children and their legal representatives than they were previously. The nature of the information available from such records gives rise to Plaintiffs' injuries, as it requires that identifying information concerning the adoptive and biological parents be accessible once the child is 21 years old. The Court finds that there is a clear relation between the Act and the injury claimed by these Plaintiffs.

Finally, the Court finds that the relief requested by these Plaintiffs, if granted, would redress their

injury. Since the Plaintiffs' injuries are based on the Act's requirement that the records of adopted children, including identifying information about the biological and adoptive parents, be accessible once the child reaches 21 years of age, an injunction preventing the law from being enforced will plainly redress these harms. Accordingly, the Court concludes that Plaintiffs Promise Doe, Jane Roe, Kimberly C. and Russ C. have met the three requirements of Lujan, and have adequately established standing before the Court.

[5][6] Defendants also challenge the standing of Plaintiff Small World Ministries ("SWM"). The Court finds that SWM can establish standing by showing an actual injury to itself. Sierra Club v. Morton, 405 U.S. 727, 735-740, 92 S.Ct. 1361, 1366-1369, 31 L.Ed.2d 636 (1972). SWM has alleged that the Act will adversely affect women's decisions to place their children for adoption. Injury to an organization may be established by a showing that the organization will suffer diminished financial support or membership. NAACP v. Alabama, 357 U.S. 449, 459-60, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488 (1958). Thus, if SWM were able to offer sufficient proof that the number of adoptions in Tennessee would diminish under the Act, it would have standing as a result of its imminent financial injury. The Court finds that the evidence presented thus far by the parties is conflicting as to the Act's potential impact upon adoption trends in Tennessee. For this reason, Plaintiff SWM's claims for injury in this respect are not sufficiently strong to warrant the granting of a temporary injunction.

However, there is a sufficient issue regarding potential injury to prevent the Court from dismissing SWM for lack of standing at this time. If the case proceeds to trial and the record is further developed on this issue, Defendants can challenge the evidence regarding SWM's organizational injury on standing grounds, if they wish to do so. Minority Employees of the Tennessee Department of Employment Security, Inc. v. State of Tennessee, Department of Employment Security, 573 F.Supp. 1346, 1348 (M.D.Tenn., 1983) (stating that standing is a jurisdictional issue, and whenever lack of standing is discovered it is cause for dismissal); Skolnick v. Board of Commissioners, 435 F.2d 361, 363 (7th Cir., 1970) (dismissing case on appeal for grounds not cited by district court, e.g. lack of standing when dispositive statistics became available to the Court of Appeals).

[7] This finding is bolstered by the Court's recognition that extensive personal information is required from both biological and adoptive parents in order for an adoption agency to work effectively and in the best interest of everyone involved. The Court takes notice, therefore, that one injurious effect on the decision to place a child for adoption may be that biological and adoptive parents will be less forthcoming with the information that they provide to adoption agencies.

For the reasons stated above concerning Plaintiffs Promise Doe, Jane Roe, Kimberly C., and Russ C., the Court finds that SWM has also met

Lujan's remaining two requirements that a causal connection exist between the injury and the challenged act, and that the relief requested be adequate to redress the injury.

2. Contractual Claims:

Plaintiffs contend that some birth parents might have relied upon adoption agencies' promises of confidentiality based on the former Tennessee adoption statute when they surrendered their children for adoption. Plaintiffs maintain that since the Act retroactively unseals adoption records that since 1951 have been unavailable except upon consent of the birth parent or court order, the Act breaches a contractual obligation of the State of Tennessee to keep the records sealed. Amended Complaint, Doc. No. 7, p. 15. However, officially, State adoption procedures have never promised total confidentiality to birth parents. This fact is reflected by the absence of references to confidentiality in the forms that birth mothers signed under the former statutory scheme to surrender their parental rights. Under the prior legislation, adopted persons were allowed to access their records at court discretion. This process created wide variance in access to adoption records for those who petitioned, as courts across the state applied their own interpretations of what constituted a "compelling" need for access to adoption records. Record of Adoption Commission, Exhibits A and B to Affidavit of Caprice East, Doc. No. 83. Further, in the judicial procedure formerly in force, biological parents did not

receive notice that their identities might be revealed by court order, and were not given an opportunity to voice their own concerns regarding access. Thus, under the prior statute, birth parents did not have a guarantee of confidentiality.

[8][9][10] Plaintiffs criticize the Act's retroactive provisions. However, the State of Tennessee may pass retroactive, remedial legislation in areas reserved for state governance. As indicated above, adoption law is a state statutory creation. Therefore the Tennessee legislature was within its powers to amend its former adoption procedure. Although the Tennessee Constitution generally bars retroactive laws, retroactive legislation is permitted when it is remedial in nature. Tenn. Const. Art. I., § 20. See also, Morris v. Gross, 572 S.W.2d 902, 907 (Tenn., 1978) (noting the general prohibition on retroactive legislation under the Tennessee Constitution); Morford v. Yong Kyun Cho, 732 S.W.2d 617, 620 (Tenn.App., 1987) (holding that remedial legislation is permissible when providing the means or methods by which a cause of action may be effectuated, wrongs redressed, and relief obtained). Further, the retroactive nature of some of the Act's provisions does not render the Act unconstitutional under federal law. Federal law bars retroactive legislation when it violates the Due Process Clause of the Fifth Amendment by interfering with listed constitutional rights or with a right not specifically enumerated in the Constitution which the Supreme Court has deemed to be fundamental. As shall be shown below, the Act does not infringe upon the

Plaintiffs' federal constitutional rights, and therefore, the retroactive and prospective aspects of the statute are permissible under the United States Constitution.

3. Constitutional Issues:

The Plaintiffs argue that under the Fourteenth Amendment the Act violates their fundamental rights--specifically, a familial right of privacy, a right to reproductive privacy, and a right to non-disclosure of personal matters. Although the United States Supreme Court fails to recognize a generally existing right to privacy, it has found that a right of personal privacy and autonomy, or a guarantee of certain privacy areas or zones exists under the Constitution's Fourteenth Amendment. Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973). Thus, a key question for this Court is whether a birth parent's right to prevent an adult adoptee from accessing confidential adoption information, including the identity of the birth parent, is analogous to fundamental privacy and autonomy rights the Supreme Court and the Circuits have found elsewhere. See, e.g., Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (familial right of privacy unduly burdened by zoning regulation that interfered with extended family members' ability to live under one roof); Carey v. Population Services Int'l, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (statute allowing only pharmacists to distribute contraceptives unduly

burdens the "fundamental" privacy right to decide whether or not to procreate).

The Supreme Court has recognized that the familial rights to marry, establish a home, and raise children are fundamental privacy interests entitled to constitutional protection. Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), reh'g denied, 321 U.S. 804, 64 S.Ct. 784, 88 L.Ed. 1090 (1944). Additionally, the Court has held that a woman's decision whether or not to carry a pregnancy to term is a protected, fundamental privacy right. Roe v. Wade, 410 U.S. at 152, 93 S.Ct. at 726. However, as shall be shown below, the disclosure of private information to adult adoptees under the Act is not sufficiently analogous to fundamental familial and reproductive privacy rights. Further, the Supreme Court and the Sixth Circuit do not recognize a right to the nondisclosure of personal information.

[11] Plaintiffs assert that a familial right of privacy may be endangered under the statute by either siblings of adopted children seeking information about adoptive parents, or by adoptees seeking information about birth parents. (Memorandum in Support, p. 8). However, the Court finds that the Plaintiffs' claims are more accurately analyzed in terms of the release of confidential information, rather than in terms of familial privacy. The Act does not directly impinge upon birth parents rights to subsequently marry, have, and raise children as they see fit, or upon adoptive parents' right to raise their adoptive children

as they see fit. Thus, the Act does not fall within the scope of a Constitutional right to familial privacy and autonomy as defined by caselaw. See, e.g. Loving v. Com. of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (striking down law which prohibited interracial marriage); Moore v. East Cleveland, 431 U.S. at 494, 97 S.Ct. at 1933 (1977) (familial right of privacy unduly burdened by zoning regulation that interfered with the ability of extended family members to live under one roof); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (familial rights unduly burdened by law forbidding children's attendance at parochial schools). If the Act creates harm for the families of birth parents, and adoptive parents it is through the impact that the release of formerly confidential information will have upon the individuals within those families. However, the Act has mechanisms intended to address disruption of the families of birth parents and adoptive parents that may result from either unwanted contact, or the disclosure of any information gained under the Act to the public at large. Unwanted contact and disclosure of information gained under the Act are both criminalized under the new statute and its amendments, and may also give rise to civil damages. See T.C.A. § 36-1-132 (Public Chapter No. 1054, § 119, Public Chapter No. 1068, § 1). Moreover, regarding adoptive families, no information concerning an adopted child may be released unless that child is over age 21. Additionally, the Act intends to prevent the release of adoptive parents' confidential information

by removing adoptive parents' home study documents from adoption files before the files are made available to those with access under the Act. T.C.A. § 36-1-102(7)(C) (Public Chapter 1054, § 7). Thus, the Court hopes that ultimately adoptive parents' and birth parents' fears will be largely ameliorated by the Act's provisions.

[12] In addition to claiming that the Act interferes with Constitutionally protected familial privacy, Plaintiffs maintain that the new legislation interferes with their right to reproductive privacy. Specifically, they allege that "because parents rely on anonymity when deciding whether to carry a child to term and place it for adoption, the Act will cause more women to abort their babies." Pls. Memorandum in Support of Motion for a Temporary Restraining Order, Doc. No. 3, p. 10. Here, Plaintiffs conflate the decision as to whether to carry a pregnancy to term with the right to place a child for adoption. While the Supreme Court recognizes a woman's fundamental right of privacy regarding the termination of a pregnancy, neither the Supreme Court nor the Tennessee Supreme Court has found adoption to be a reproductive choice entitled to similar constitutional protection.

Once a woman decides to continue her pregnancy to term, she may decide to place the child for adoption. While the Act's provisions regarding access to information and potential future contact may impact a parent's decision to release a child for

adoption, they do not interfere with a "reproductive right of privacy," since they fail to impinge upon a woman's right under the Act to carry a pregnancy to term.

In Tennessee, adoption was created by the state legislature through state statutes. In re Adoption of Mullins, 219 Tenn. 666, 412 S.W.2d 896 (1967). As caselaw and legislative history indicate, adoption developed in Tennessee to protect children's best interests in instances where birth parents were either unable or unwilling to take responsibility for their care. Young v. Smith, 191 Tenn. 25, 231 S.W.2d 365, 367 (1950); Ex parte Wolfenden, 49 Tenn.App. 1, 349 S.W.2d 713 (1961). Thus, under Tennessee state law, adoption is set up to protect predominantly children's interests.

The choice to surrender a child for adoption is undoubtedly a deeply personal, wrenchingly emotional decision. However, the Act is not intended to impact upon a woman's decision with respect to adoption. According to the Supreme Court, "Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Since the Act does not prohibit adoption, it cannot be deemed analogous to direct government restraints on private, fundamental decision making. Such restraints are embodied in laws that the Supreme

Court has found unconstitutional, such as laws that criminalize abortion, Roe, 410 U.S. at 113, 93 S.Ct. at 707; prohibit interracial marriage, Loving v. Virginia, 388 U.S. at 1, 87 S.Ct. at 1818; outlaw married couples' use of birth control, Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); or forbid children's attendance at parochial schools, Pierce v. Society of Sisters, 268 U.S. at 510, 45 S.Ct. at 571; however such restraints are not found in this case.

The Plaintiffs also argue on the basis of non-binding authority from other jurisdictions that biological parents have an expectation of privacy from disclosure of constitutionally protected confidential information. Plaintiffs cite In re Assalone, 512 A.2d 1383, 1386 (R.I., 1986), Bradey v. Children's Bureau of South Carolina, 275 S.C. 622, 274 S.E.2d 418 (1981) and Alma Society, Inc. v. Mellon, 601 F.2d 1225 (2nd Cir., 1979), cert denied, 444 U.S. 995, 100 S.Ct. 531, 62 L.Ed.2d 426 (1979) in support of this proposition. However, the cases cited by Plaintiffs are actions by adult adoptees attacking the constitutionality of state statutes limiting access to adoption records. In the cited cases, courts have upheld the statutes' constitutionality and states' legitimate public interests in maintaining these records' confidentiality, which provides a rational basis for the statutes. Assalone, 512 A.2d at 1390; Bradey, 274 S.E.2d at 421; Alma Society, 601 F.2d at 1235. Regarding the issue at hand, these cases acknowledge that the state legislature is the proper entity to decide whether it is in the public

interest to change the procedure for releasing information in adoption records. Id. Additionally, some other courts have held that statutes governing the release of adoption records represent procedural issues which are for the legislature to decide and which do not affect any vested interests. Application of Gilbert, 563 S.W.2d 768, 770 (Mo.1978); Matter of Linda F.M., 92 Misc.2d 828, 830, 401 N.Y.S.2d 960 (N.Y.Sur., 1978).

[13] Plaintiffs also cite the United States Supreme Court's statement, in Whalen v. Roe, that a person has "an individual interest in avoiding the disclosure of personal matters," 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977), in arguing that there is a constitutional right to the nondisclosure of personal information. However, a close analysis of Whalen reveals that such an interest, while cognizable, does not rise to the level of a constitutionally protected right. Id. at 604, 97 S.Ct. at 878-79 (upholding the constitutionality of a New York law requiring that prescriptions of certain drugs be written in triplicate and reported to a state registry). The Supreme Court stated in Whalen that "[A]lthough the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no general constitutional 'right to privacy.' ... [T]he protection of a person's general right to privacy ... is, like the protection of his property and his very life, left largely to the law of the individual states." Id. at 607-08, 97 S.Ct. at 880-81 (J. Stewart concurring, citing Katz, 389 U.S. at 350-51, 88

S.Ct. at 510-11).

In addition to Supreme Court authority, there is also Sixth Circuit caselaw addressing whether the disclosure of private information is constitutionally protected. J.P. v. DeSanti, 653 F.2d 1080, 1088-89 (6th Cir., 1981). The DeSanti court specifically held, regarding nondisclosure of juvenile court records, that constitutional privacy rights are restricted to "those rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' " The Court also stated that the safeguards against the nondisclosure of private information "must be left to the state or the legislative process." Id. at 1090-91. The holding in DeSanti has been affirmed in subsequent decisions by the Sixth Circuit Court of Appeals. The Court recently found that there was no violation of a constitutional right of privacy in the disclosure of an inmate's HIV status. Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir., 1994). Analogizing from these cases, the Plaintiffs' claim that the Act violates a birth parent's federal constitutional right to the nondisclosure of private information must fail.

[14] Plaintiffs' rights under the Tennessee Constitution are similar to their rights under the United States Constitution. The Tennessee Supreme Court, in Davis v. Davis, recognized a right to privacy in matters of "procreational autonomy," 842 S.W.2d 588, 600, (1992), cert. denied 507 U.S. 911, 113 S.Ct. 1259, 122 L.Ed.2d 657 (1993) similar to the zone of

privacy in reproductive decision-making the Supreme Court upheld in Roe and Griswold. Also, like the United States Supreme Court, the Tennessee Supreme Court has never held that a general right to privacy extends to the nondisclosure of personal information, and any determination of such rights has been left to the legislature. Thus, under the Tennessee Constitution, there is no right to the nondisclosure of personal information, and Plaintiffs' Tennessee Constitutional claims cannot survive.

In addition to their claims regarding fundamental Constitutional privacy rights, the Plaintiffs also maintain that the Act violates their rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Amended Complaint, Doc. No. 7, p. 14. Although they do not set forth their argument as to this cause of action in their Memorandum, their statements during oral arguments indicate their concern that the Act discriminates between those women in Tennessee who will opt for abortion and those women who will choose to carry a pregnancy to term and place the child for adoption under the new statutory scheme. The Act states that a woman who chooses to carry a child to term and surrender it for adoption may eventually have her identity and other personal, adoption-related information revealed to her child, or that child's representative. The Plaintiffs argue that since abortion related records are sealed there is no threat to women who opt for abortion under Tennessee state law that third parties could

subsequently access private, abortion-related information.

[15][16] To succeed in an equal protection claim, Plaintiffs must show that either (1) they have been burdened by state action because they are members of a suspect class or (2) that their fundamental constitutional rights have been burdened because they are a member of a government selected classification. Thus far, the Supreme Court has deemed only classifications based upon race and national origin as suspect. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Since women who surrender children for adoption under the Act are not categorized according to their race or national origin, and they have not been singled out to be deprived of their rights under color of state law, they are not a suspect class. Thus, the Plaintiffs cannot demand that the Court impose strict scrutiny on the Act.

[17][18] In the absence of suspect classification, Plaintiffs might alternatively argue that birth mothers are a "semi-suspect" class. If these plaintiffs were deemed a semi-suspect class, the Court would apply middle-level scrutiny to the Act. To withstand middle-level scrutiny, the government must only demonstrate that the classification be "substantially" related to the achievement of an "important" government objective. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), reh'g denied, 429 U.S. 1124, 97 S.Ct. 1161, 51 L.Ed.2d 574 (1977).

However, the Act should withstand middle-level scrutiny, since making adoption records available to adult adopted persons with certain restrictions is substantially related to the State of Tennessee's stated objective of balancing the interests involved in administering adoption in Tennessee.

[19] If a statutory classification burdens a fundamental right, the Court would apply strict scrutiny regardless of the characteristics of the people who are burdened. However, the Supreme Court has only acknowledged fundamental rights for equal protection purposes in a limited number of instances, including: (1) the right to vote, Harper v. Virginia Board of Elections, 383 U.S. 663, 667, 86 S.Ct. 1079, 1081-82, 16 L.Ed.2d 169 (1966); (2) the right to have access to the court, Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), reh'g denied, 351 U.S. 958, 76 S.Ct. 844, 100 L.Ed. 1480 (1956); and (3) the right to interstate migration. Shapiro v. Thompson, 394 U.S. 618, 630, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600 (1969). Because the Supreme Court has never recognized a claim similar to that brought by the Plaintiffs as a fundamental right for equal protection purposes, the Plaintiffs' equal protection claim must fall.

B. Risk that the Plaintiffs will Suffer Irreparable Harm:

[20] The Court acknowledges the concern and anxiety that some birth parents and adoptive parents will feel as a result of the passage of this statute.

However, as indicated above, the Act contains a number of provisions intended to protect these groups from the majority of the consequences that might give rise to their fears.

The Act and its amendments have mechanisms intended to address disruption of the birth parents' families' lives that may result from either unwanted contact despite a contact veto, or the disclosure of any information gained under the Act to the public at large. Unwanted contact and disclosure of information gained under the Act are both criminalized under the new statute, and may also give rise to civil damages. See T.C.A. § 36-1-132 (Public Chapter No. 1054, § 119); and T.C.A. § 36-1-132 (Public Chapter No. 1068, § 1).

As noted above, Plaintiffs maintain that adoptive parents, such as Kimberly C. and Russ C., will be harmed if personal information maintained in their files is released under the Act, for example, to birth siblings of their adopted children. Memorandum in Support, p. 8. However, under the Act, no information concerning an adopted child may be released unless that child is over age 21. Further, under the Act, home study information obtained from adoptive parents is not contained in the information which would be made available to the limited group of persons able to access adoption files under the Act. T.C.A. § 36-1-102(7)(C) (Public Chapter 1054, § 7).

Plaintiffs argue that adoption agencies, such as

Small World Ministries, Inc., will be adversely impacted by the legislation in that they will be forced to renege on prior assurances they provided to birth parents and adoptive parents regarding the records' confidentiality. Additionally, according to Plaintiffs, the new law will injure adoption agencies by discouraging birth parents from placing children for adoption. Regarding the former claim, as noted above, Tennessee State adoption procedures have never offered total confidentiality to birth parents. Under the former statutory scheme, adoptees were allowed access to their adoption records if they petitioned the courts and the court granted discretionary access. This process gave rise to variable, unpredictable results. Record of Adoption Commission, Exhibits A and B to Affidavit of Caprice East, Doc. No. 83. In fact, under the court discretionary procedure formerly in place, biological parents were not offered notice or an opportunity to be heard, and were not entitled to consideration on the question as to whether access would be permitted. Thus, an adoption agency's past assurances of confidentiality were either subject to these former statutory limitations, or erroneous.

Regarding the potential impact of the Act upon women's decisions as to whether to place children for adoption via Tennessee state agencies, the Court finds the Plaintiffs' claims to be speculative and a matter on which the proof should be further developed. Although Plaintiffs cite evidence derived from international sources in support of their claims, Plaintiff's Amended Complaint, Doc. No. 7, ¶ 23,

Defendants and Amici also cite comparative evidence and analysis in their briefs and oral argument tending to undermine Plaintiffs' contentions. See Affidavit of Frederick F. Greenman, attached to Brief Amicus Curiae filed by Jim Holcomb, Joe Fowlkes, Caprice East, and Robert D. Tuke, Doc. No. 73. Thus, the Court finds that at this time it is not possible to accurately forecast the Act's impact upon Tennessee adoption agencies without further development of the evidentiary record.

C. Injury to Plaintiffs Outweighing Potential Harm to Other Parties if the Preliminary Injunction is Not Granted and Public Interest in the Preliminary Injunction:

The Court is aware that if a preliminary injunction is granted and the Act's enactment is delayed, numerous adult adoptees and birth parents will experience disappointment, frustration, and in some instances psychological distress. See Memorandum and Affidavits of Amicus Curiae Teresa Evetts Horton, Kay Garrett, et. al. Doc. Nos. 12-70. The Court has granted Amicus Curiae status to a group of sixteen birth parents, five adoptive parents, and thirty-three adoptees who testify to their desire for access to records under the Act's terms in order to facilitate adoptees' and birth parents' coming to terms with their experiences. Id. Defendants have also made reference in oral arguments as to the many adult adoptees who came forward and expressed similar sentiments at statewide hearings held prior to the

passage of this legislation. Additionally, medical and psychological experts have recognized the psychological needs of adult adoptees which can be assuaged through access to adoption records. See Jason Kuhns, The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy, 24 Golden Gate U.L.Rev. 259, 271-274 (1994). When the harm which will, according to the testimony of the Amicus Curiae, befall adult adoptees, adoptive parents, and birth parents who favor the Act's passage if the statute is not enacted, is weighed against the Plaintiffs' injuries, the Court finds that, given the Act's present protective measures, the public interest favors a denial of the preliminary injunction.

The Court does not intend by this holding to belittle the concern or fears of birth parents and adult adoptees who do not wish to have contact with birth family from whom they have been separated by adoption. However the Court hopes and trusts that with the protection of the Act's criminal and civil sanctions against those who violate a contact veto or disclose to the public information acquired under the Act, the problems which give rise to such fears will not come to pass.

CONCLUSION:

For the reasons discussed above, the Court concludes that Plaintiffs have failed to satisfy the stand for the issuance of a preliminary injunction. Accordingly, the Court hereby DENIES Plaintiffs' Motion for a Preliminary Injunction. The Court also

DENIES the Plaintiffs' Motion to Consolidate the Preliminary Injunction Hearing with a Hearing on the Merits.

An order consistent with these findings is filed contemporaneously.

APPENDIX F

TENNESSEE CODE ANNOTATED
TITLE 36 DOMESTIC RELATIONS
CHAPTER 1 ADOPTION
Part 1– General Provisions

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36-1-127 Availability of records to adopted persons and certain other persons for adoptions finalized or attempted prior to March 16, 1951.

(a)(1) On March 16, 1951, Chapter 202 of the Public Acts of 1951 became effective. As a result, all records related to persons who had been adopted, all records concerning a person for whom any records were maintained and which may have related to an adoption or attempted adoption and which were treated by the department of human services, the former department of public welfare, the courts, the department of health, or any other information sources as a sealed record or sealed adoption record involving an adoption or attempted adoption of a person, became confidential, non-public records which were not made readily available to persons about whom the records were kept.

(2) It is the intent of the general assembly that all adoption records, court records, sealed records, or

sealed adoption records, and post-adoption records and other records or information, except as may otherwise be provided in this part, and which are contained in any information source on and after January 1, 1996, and which were in existence on March 16, 1951, be made available to eligible persons as provided in this part, and that to that end this is remedial legislation.

(3) It is the further intent of the general assembly, in view of the testimony before the adoption study commission established by Senate Joint Resolution 17 of the Ninety-Eighth General Assembly (1993 session), which testimony demonstrated the great concern by many persons regarding the practices of certain Tennessee adoption agencies in earlier years, that any adoption records, sealed records, sealed adoption records or post-adoption records, or other records maintained at any time by the Tennessee children's home society or its branches or divisions, chartered on June 24, 1913, and authorized under Chapter 117 of the Public Acts of 1919 (Senate Bill 947); and any branch or division thereof, including an organization known as the Tennessee children's home society-Shelby County division, which was referenced in the report of the Tennessee department of public welfare to Governor Gordon Browning dated June 12, 1951, shall also be made available to eligible persons in accordance with this part, whether such records were completed or sealed before, on, or after March 16, 1951, and whether any persons subject to the care and supervision of such agency or its branches were

ever actually adopted, and to that end this is remedial legislation.

(b) Effective January 1, 1996, pursuant to the requirements of subsections (g) and (h) of this section, and subject to the restrictions in the following sections or subsections:

(1)(A) All adoption records, sealed records, sealed adoption records, post- adoption records, home studies, or any other records or papers, existing prior to March 16, 1951, and relating to the adoption or attempted adoption of a person, which adoption was finalized by completion of the adoption by the entry of an order of adoption or an order of dismissal of the adoption proceeding prior to March 16, 1951; or which adoption was otherwise never completed due to the abandonment, prior to March 16, 1951, of any further necessary activity related to the completion of the adoption, and which records were sealed or closed by the court before that date, or where the record or other evidence demonstrates that a person was surrendered for adoption prior to March 16, 1951; or

(B) Any adoption records, sealed records, sealed adoption records, post- adoption records, or any other records or papers, existing prior to March 16, 1951, and relating to the adoption or attempted adoption of a person which, before the effective date of Chapter 532 of the Public Acts of 1995 [see Compiler's Notes], have been treated as, or have been determined by the department or any other information source to be,

cases of adoptions finalized by the completion of the adoption by the entry of an order of adoption or by entry of an order of dismissal of the adoption prior to March 16, 1951; or which have been treated by or are determined by the department as finalized adoptions due to the abandonment, prior to March 16, 1951, of any further necessary activity related to the completion of the adoption, or where the record or other evidence demonstrates that a person was surrendered for adoption prior to March 16, 1951; or

(2) All adoption records, sealed records, sealed adoption records, post- adoption records, or any other papers or records, existing either before or after March 16, 1951, concerning a person who was subject to the care and supervision, or subject to placement for foster care or adoption, by any agency described in subdivision (a)(3), or which records were maintained by any child care or child-placing agency which had, either before or after March 16, 1951, subsequently assumed the care and supervision of a child who had previously been subject to the care and control of an agency described in subdivision (a)(3), whether or not the adoption of such person was the plan, whether the person was placed for the purpose of adoption or whether the adoption was finalized by entry of an order of adoption or by order of dismissal of the adoption, whether the adoption was attempted, or was otherwise never completed due to failure to file an adoption petition or due to the abandonment of any further necessary activity related to the completion of the adoption, either before or after

March 16, 1951; and

(3) Which records are in the office of the clerk of the adoption court, in the offices of the department of health, in the office of any child-placing agency, whether or not it is chartered or licensed, in the state, district, or county offices of the department of children's services, or in any other information source, shall be made available to the following eligible persons:

(A) An adopted person or a person subject to subdivision (b)(1) and (2) who is twenty-one (21) years of age or older for whom an adoption record, sealed record, sealed adoption record, post-adoption record, or other record or paper is, nevertheless, maintained;

(B) The parents of any person described in subdivision (b)(3)(A);

(C) The siblings of any person described in subdivision (b)(3)(A);

(D) The lineal descendants, twenty-one (21) years or older, of any person described in subdivision (b)(3)(A);

(E) The lineal ancestors of a person described in subdivision (b)(3)(A); or

(F) The legal representatives of the person

described in subdivisions (b)(3)(A)-(E).

(c) Effective July 1, 1996, pursuant to the requirements of subsections (g) and (h), and subject to the restrictions in the following sections or subsections:

(1)(A) All adoption records, sealed records, sealed adoption records, post- adoption records, or any other records or papers for a person relating to the adoption or attempted adoption of a person, which adoption was finalized by the completion of the adoption by the entry of an order of adoption or an order of dismissal of the adoption proceeding on or after March 16, 1951, or which records relate to an adoption or attempted adoption where the adoption petition was filed on or after March 16, 1951, or which was otherwise never completed, due to the abandonment, as determined by the department, on or after March 16, 1951, of any further necessary activity related to the completion of the adoption, and which records are in the office of the clerk of the adoption court, in the offices of the department of health, in the office of any child-placing agency, whether or not it is chartered or licensed, in the state, district, or county offices of the department of children's services, or in any other information source, shall be made available to the following eligible persons:

(i) An adopted person or a person subject to subdivision (c)(1)(A) who is twenty-one (21) years of

age or older on whom an adoption record, sealed record, sealed adoption record, post-adoption record, or other record or paper is maintained;

(ii) The legal representative of a person described in subdivision (c)(1)(A)(i).

(B) Information from any records of an adopted person, or any person otherwise subject to subdivision (c)(1)(A) for whom records are otherwise maintained, shall be released by the department or any other information source only to the parents, siblings, lineal descendants, or lineal ancestors, of the adopted person or of a person for whom records are maintained as described in subdivision (c)(1)(A), and only with the express written consent given to the department by the adopted person or of a person for whom records are maintained as described in subdivision (c)(1)(A), twenty-one (21) years of age or older, or such person's legal representative, and, notwithstanding any other of the following provisions of this part to the contrary, the adopted person or a person for whom records are maintained as described in subdivision (c)(1)(A), such person's legal representative shall, under no circumstances, be required to take any affirmative action pursuant to the contact veto provisions of this part to protect the confidentiality of such identifying information; provided, that nothing herein shall be construed to prevent access to identifying information in the records of the adopted person as otherwise permitted or required pursuant to §§ 36-1-125, 36-1-126 and 36-

1-138.

(C) If an adopted person or a person for whom records are maintained as described in subdivision (c)(1)(A) is deceased or is disabled as defined for purposes of appointment of conservator under title 34, the lineal descendants of such person may petition the court pursuant § 36-1-138(c)(7), to be given access to the records of such person. A lineal descendent given access pursuant to this subdivision is subject to all the requirements of the contact veto process.

(2) Notwithstanding any other law to the contrary, §§ 36-1-139 and 36-1-141 as such sections existed immediately prior to January 1, 1996, shall be revived and shall continue in full force and effect from May 15, 1996, and shall expire on July 1, 1996, to provide a method for contact with siblings and biological parents as provided therein until the effective date of the contact veto process.

(3) On July 1, 1996, the contact veto registry process and records access procedure established pursuant to subdivision (c)(1) and subsections (d)-(h) and other sections of this part shall become effective for access to records and contact by eligible persons under this part as set forth in subdivision (c)(1) and any other provisions of this part.

(4) Effective January 1, 1996, the basis for judicially-ordered opening of all records pursuant to this part

shall be the provisions set forth in § 36-1- 138 and any other relevant provisions of this part.

(d) No contact, whether by personal contact, correspondence, or otherwise, shall be made in any manner whatsoever by those requesting persons who are subject to the provisions of subsection (c), or any agent or other person acting in concert with those requesting persons, with any person(s) eligible to file a contact veto under the provisions of §§ 36-1-128 – 36-1-131, except as permitted pursuant to those sections.

(e)(1) Except in cases arising pursuant to subsection (b) or § 36-1-138, no access to identifying information in any adoption record, sealed record, sealed adoption record, post adoption record or adoption assistance record shall be granted:

(A) To any parent, pre-adoptive guardian, sibling, lineal descendant or lineal ancestor of a person under twenty-one (21) years of age; or

(B) At any time to any parent or pre-adoptive guardian, or to a sibling, lineal ancestor, or spouse or legal representative of the person whose rights were involuntarily terminated for cause in a termination of parental rights proceeding; or

(C) To any persons whom the sealed record, sealed adoption record or the post adoption record indicate were guilty of a crime of violence or neglect involving

the person who was placed for adoption or who was the subject of the termination of parental rights by court action or by surrender or parental consent.

(2) Notwithstanding any other provision of law to the contrary, no identifying information from the sealed records, sealed adoption records or post adoption records shall be released without the written consent of the biological parent if such records indicate that, with respect to the adopted person, the biological parent was the victim of rape or incest. If a biological parent for whom records contain such information is deceased or if a conservator of the person and property of such person has been appointed under title 34, the lineal descendants of such person may petition the court pursuant to the same procedures established pursuant to § 36-1-138(c)(7) to be given access to identifying information of the biological parent. A lineal descendant given access pursuant to this subsection is subject to all requirements of the contact veto process.

(f) The adoption record, sealed adoption record, sealed record, or post- adoption record requested by the persons stated in subsection (c) shall be made available only after completion by the requesting party of a sworn statement agreeing that such person or persons shall not contact or attempt to contact in any manner, by themselves or in concert with any other persons or entities, any of the persons eligible to file a contact veto pursuant to § 36-1-128, until the department has completed the search of the contact

veto registry as provided in § 36-1-130 or pursuant to § 36-1-131, and that such person or persons understand the legal remedies for violation of the contact veto. The sworn statement shall contain language, which shall be acknowledged by the requesting party, concerning the existence of the contact veto procedure and the legal remedies for breach of the contact veto.

(g)(1) Access by any eligible person under any subsection of this section to any records held by the department, the court, the department of general services or health, or any licensed child-placing agency or licensed clinical social worker may only be had after verification of the identity of the requesting party and written authorization by the department is received by those information sources from the department.

(2) If the department does not have a sealed record, sealed adoption record, or post-adoption record, and if the person seeking information concerning the history of an adopted person has a copy of the order of adoption from a Tennessee court, or in cases where the adoption was handled by any agency described in subdivision (a)(3), a copy of an order of adoption from any other court and/or any other proof of the person's care, supervision, or placement for adoption by any agency described in subdivision (a)(3), and any other proof of the adoption of the person in Tennessee, any of which, in the discretion of the department is satisfactory to prove that the person is

an eligible person, the department may issue a statement to that person permitting that person to obtain access to any records held by any other information source.

(h)(1) A request for access to an adoption record, sealed adoption record, sealed record, or a post-adoption record, pursuant to this section, shall be made in writing to the department.

(2) The writing shall include the following information:

(A) The name, date of birth, address, and telephone number of the person requesting the access;

(B) Information, including legal documents or affidavits, if available, which establish the person's legal relationship to any person under this section or which otherwise establishes the person's right to request access;

(C) Any other information which the department requires to establish the person's identity, to locate records involving the requesting parties or the persons with whom contact may be sought, and to establish the person's right to request access; and

(D) Identification of any person(s) or class of persons, if any, with whom the requesting party seeks contact; provided, that this provision shall not apply to persons seeking information pursuant to subsection

(b).

(3) If the information in the written request does not establish the person's right to have access to the records, the department will search the sealed adoption and post-adoption records, including those of other alleged siblings, if available, for information which may establish the person's right to have such access.

APPENDIX G

TENNESSEE CODE ANNOTATED
TITLE 36 DOMESTIC RELATIONS
CHAPTER 1 ADOPTION
Part 1-- General Provisions

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36-1-128 Contact veto registry -- Persons eligible to have names entered.

(a) The department shall establish and maintain a contact veto registry for the purposes of permitting registration of the willingness or unwillingness of the persons or classes of persons named herein for contact with persons eligible to have access to any records covered by this part; provided, that the contact veto registry shall not be applicable to records requested pursuant to § 36-1-127(b).

(b) The following persons may have their names entered in the registry either to file a contact veto or to give consent to contact:

(1) A parent, sibling, spouse, lineal ancestor, or lineal descendant of an adopted person or a person for whom records are maintained as described in § 36-1-127(c)(1)(A), either before or after such persons reach twenty-one (21) years of age.

(2) The legal representative of any person described above.

(c) The registry shall contain the following information:

(1) The name of each person who has duly filed a contact veto or who has given consent for further contact;

(2) The address given by the person as the address at which any personal, postal, or telephone contact shall be made by the department;

(3) The date and place of birth of the person, if known;

(4) Any persons whom the person who files a contact veto wishes to exclude from the application of the contact veto pursuant to § 36-1-130(a)(6)(A)(i);

(5) The name, address, and telephone number of the person requesting contact so as to be notified in the event that the contact veto is withdrawn or varied;

(6) The method of contact, if any, to which the person consents, including contact through one (1) or more third parties; and

(7) Any other information which eligible parties wish to release to the other eligible parties.

(d) Within ninety (90) days of January 1, 1996, and periodically thereafter on at least an annual basis, through the use of public service announcements and other forms of media coverage as may be available without cost, the department shall announce the existence of the registry and its services.

36-1-129 Procedures for filing contact veto or giving consent.

(a)(1) A person eligible to file a contact veto or give consent for further contact may notify the department in writing on a form supplied by the department that such person does or does not object to contact being made with such person by any person or group of persons who are eligible to establish contact. The department shall supply the necessary form upon request of any persons eligible to have their names entered on the registry.

(2) A contact veto is not effectively filed or consent properly given unless the person provides the department with satisfactory proof of such person's identity and completes and files with the department a form from the department containing the relevant information in § 36-1-128(c) and pays any necessary fees.

(b) As part of the surrender under § 36-1-111 or as part of a parental consent, a biological parent or guardian shall indicate in the appropriate place on the surrender or parental consent document whether or

not such person wishes to file a contact veto or give consent for further contact, and shall complete the information requirements for registration on the contact veto registry on a form supplied by the department containing the relevant information in § 36-1-128(c). A contact veto is not effectively filed or consent properly given unless the person surrendering or giving a parental consent completes such form at the time of the surrender or parental consent or properly files the form with the department at a later time; provided, that no fee for filing a contact veto or consent to contact shall be required if the veto or consent is completed at the time of the surrender or parental consent. If, for any reason, the person failed to complete a consent for contact or a veto at the time of the surrender or parental consent, the person may do so at later time after compliance with all provisions for filing, including the payment of all necessary fees.

(c) By filing a contact veto which complies with the requirements of this section, a person is entitled to notification of any inquiry requesting contact with the filing person.

(d) Forms for filing consents for contact or for filing contact vetoes shall be made available by the department in the offices of the clerks of courts with adoption jurisdiction and in the department's state office and county offices.

(e) The department shall report to the judiciary

committee of the house of representatives and the judiciary committee of the senate of the One Hundredth General Assembly on or before January 15, 1998, concerning the use of the contact veto under this part, the frequency of violations of the contact veto and the number and nature of any complaints or objections to the contact veto procedure received by the department since July 1, 1996.

36-1-131 Search of sealed adoption record, sealed record or post-adoption records -- Opportunity to veto contact.

(a) If, after a search has been made of the registry and either no person with whom contact was requested was located on the registry or the person named on the registry could not be notified at the address designated in the registry, the department shall search the sealed adoption record, sealed record or the post-adoption records in its possession for information concerning the location of the person who is the subject of the search and shall conduct a diligent search for such person.

(b)(1) Upon locating such person whose relationship to the requesting party is confirmed by the person sought or whose relationship to the requesting party is or has been confirmed by other evidence satisfactory to the department, the department shall notify such person of the inquiry and of the department's determination of relationship to the requesting party.

(2)(A) Such person whose relationship to the requesting party is confirmed as provided in subdivision (b)(1), or that person's legal representative, may file a written consent with the registry.

(B) If the person wishes to veto contact, the person must, unless such person is an adopted person or a person for whom records are maintained as described in § 36-1-127(c)(1)(A) or a person for whom an automatic veto applies pursuant to § 36-1-130(a)(6)(A)(i), file a contact veto pursuant to §§ 36-1-128 and 36-1-129 and must pay any necessary fees, within ninety (90) days of the date the department gives oral or written notice of that time period for filing a contact veto. If the contact veto is timely and effectively filed pursuant to this part, then the department shall notify the requesting party in writing and no contact shall be permitted with that person with whom contact was sought. If the contact veto is not timely and effectively filed, the department shall notify the person requesting the search, and that person shall be permitted to attempt contact with the person(s) who was sought unless such person is an adopted person or a person for whom records are maintained as described in § 36-1-127(c)(1)(A), or unless such person is a person for whom an automatic veto applies pursuant to § 36-1-130(a)(6)(A)(i). Written notice shall be effective upon the date the notice is sent.

(c) If the person who is the subject of the search

whose relationship to the requesting party has been confirmed by evidence satisfactory to the department cannot be located after diligent search, including the sending of notice to the last known mailing address of such person, and, unless such person is an adopted person or a person for whom records are maintained as described in § 36-1-127(c)(1)(A) or unless such person is a person for whom an automatic veto applies pursuant to § 36-1-130(a)(6)(A)(i), the department shall inform the person requesting the search of this fact in writing, and that person shall be under no further restrictions pursuant to § 36-1-130 against contact with the person who has been sought.

APPENDIX H

[FORMER] TENNESSEE CODE ANNOTATED

36-1-129. Records kept under seal -- (a) After the final order of adoption or the final order dismissing the proceedings, all records and other papers relating to the proceedings in the office of the clerk, in the office of the department of health, in the office of child placing agency, and in the state and county offices, of the department of human services, shall be placed and remain under seal and shall be opened only by order of the Court as provided under § 36-1-131, or as otherwise provided in this part.

(b) Upon the granting or dismissal of an adoption proceeding, all records relating to the proceeding in the offices of a child placing agency shall be forwarded by the agency to the department of human services who shall place the record under seal and ensure their safekeeping.

36-1-130. Papers kept impounded pending appeal -- (a) In the event of an appeal from the ruling of the court in an adoption proceeding, the clerk shall impound all papers and reports not open to the public pending final determination of the appeal.

(b) The clerk of the court must not at any time furnish to anyone copies or certified copies of any documents in the proceeding, other than the petition, the interlocutory decree, and the final order.

36-1-131 Disclosure of information upon court order -- (a) Any necessary information in the filed or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the court of original jurisdiction or the chancery court of any county of the first class as defined in § 16-15-204, the judge or chancellor of which may issue an order to open the record, if, in the opinion of the judge or chancellor, it is in the best interest of the child or of the public to have such information disclosed.

(b) The party seeking disclosure shall serve a copy of the motion upon the commissioners of human services and health, and shall notify such commissioners when the motion will be heard, upon which occasion either or both such commissioners, should they or either of them intervene in the action, shall be allowed to respond to the motion orally and in writing.

(c) Both the moving party and the commissioners shall have standing to appeal any order entered.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. 3-96-0599
DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,	)	
Defendants.	)	

AFFIDAVIT

COME NOW, JANE ROE, and being first duly sworn, does hereby deposed and state as follows:

1. That I am an adult citizen and resident of the State of Tennessee, am fifty-seven years of age, and do make this affidavit based on my own personal knowledge, except where otherwise indicated.

2. In the Spring of 1956, at age seventeen years, I discovered that I was pregnant. I moved with my mother to Memphis, Tennessee, and went for treatment at a clinic at St. Joseph's Hospital.

3. During my pregnancy I contracted the German measles and was advised that as a result of this illness that in all likelihood, my child would be born severely handicapped and was not expected to survive.

4. When we learned of this prognosis, I was encouraged by my mother to surrender my child for adoption. I would not agree to this. My mother insisted on this, however, and we visited St. Peter's Orphanage in Memphis, Tennessee, and met with a social worker there.

5. The first thing I remember after my child's birth was my mother telling me that the child was dead -- or that the child was handicapped, blind

and deaf, and was not expected to live.

6. I never saw my child, but do recall signing some papers in the hospital prior to my release.

7. Within days following my release from the hospital I was advised that the child had died soon after I left the hospital.

8. Thirty-two years later, in October of 1988, I and my husband and one child were living in Cody, Wyoming, when I received a certified letter from a Mary Alyce Lamb, Program Specialist with the Tennessee Department of Human Services informing me that they were conducting a "search" into my personal background and needed verification from me of certain information contained on my birth certificate. (A true and correct copy of the first such letter I received from DHS is attached hereto as Exhibit A).

9. On October 12, 1988, I telephoned Ms. Lamb and inquired about why they needed this information. Ms. Lamb refused to provide me with any explanation stating that it was confidential.

10. On October 26, 1988, I received my second letter from Ms. Lamb implying that DHS had been contacted by an individual over age 25 who was asserting that I was his birth mother. As stated in the attached Exhibit B, Ms. Lamb requested a letter from

me: "Your letter needs to contain information to verify that you are the birth mother." (See Exhibit B, at ¶ 8).

11. Following the news of the sudden appearance of a child whom I had long ago thought dead, I went into a deep state of severe emotional distress and experienced shock, depression, guilt and despair over whether to comply with this request and permit the release of any identifying information to this individual. I came back to Tennessee and sought professional counseling from several sources including my priest, my physician, and an attorney about what I should do.

12. Ultimately, on November 23, 1988, I authorized my attorney to respond to Ms. Lamb declining her request for this identifying information, and reiterating my strong desire to preserve my anonymity. A true and correct copy of this letter with identifying information redacted is attached hereto as Exhibit C.

13. The events surrounding the birth and supposed death of my child in 1956 were among the most difficult and emotionally painful I have ever experienced in my life. It took several years to overcome the anguish and despair which I endured following this tragic event from my childhood. I was forced to relive this emotional trauma in 1988 upon learning for the first time that the child had survived. Recently, I learned that under the provisions of the

1996 amendments to Ten adoption law scheduled to take effect on July 1, 1996, I will no longer have any choice in the decision of government officials to release identifying information to the individual claiming to be my child. Moreover, once this information is released, I will have absolutely no control over the publication of this information to third persons in cluding my children and other family members.

14. Despite the provision of a "contact veto" in the new adoption law, my greatest fear is that the release of identifying information and other confidential records surrounding the events which occurred in my life some forty years ago, will cause yet another emotional relapse of the pain and mental anguish I have had to endure as a consequence of this tragedy. For me, this has become a nightmare that will never go away.

15. I therefore beseech this Court to enjoin the enforcement of the most recent amendments to the Tennessee adoption law, and to preserve inviolate my privacy rights and protect my anonymity and the confidentiality of any records pertaining to my surrender of this child.

Further affiant saith naught.

/s/ Jane Roe
JANE ROE

STATE OF TENNESSE)
COUNTY OF WILLIAMSON)

Sworn to and subscribed before me this /s/ 26th day of /s/ June, 1996.

/s/ Larry Crain
Notary Public

My Commission Expires: /s/ 11-16-96

EXHIBIT A

STATE OF TENNESSEE
DEPARTMENT OF HUMAN SERVICES
400 DEADERICK STREET
CITIZENS PLAZA BUILDING
NASHVILLE, TN 37219

October 6, 1988

****
****
****

Dear Ms. *******

We are presently searching for **********, born around 1940.

Would you let us know if you are or are not the individual for whom we are searching.

Will you provide us with the information which will establish that you are the individual for whom we are searching. The type of information which is needed is names of your parents, information contained on your birth certificate, etc. With the verification that you are the person we will explain the purpose of the search. It is most important that we have an opportunity to discuss with this lady the reason we are searching for her.

You may contact me at 400 Deaderick Street,

Nashville, Tennessee 37219, telephone number (615) 741-9938.

Thank you for your assistance in this matter.

Sincerely,

/s/ Mary Alyce Lamb

Mary Alyce Lamb
Program Specialist

MAL:bg

EXHIBIT B

STATE OF TENNESSEE
DEPARTMENT OF HUMAN SERVICES
400 DEADERICK STREET
CITIZENS PLAZA BUILDING
NASHVILLE, TN 37219

October 26, 1988

****
****
****

****

This to confirm our telephone conversations of October 12.

For your information a copy of the amendment to the Adoption Law is attached.

As you will note, the amendment authorizes us to open a sealed adoption record and search for the birth parents at the written request of an individual who was adopted and is 25 years of age or older.

With a birth parent's written consent we may release identifying information regarding that parent.

If a birth parent does not consent we cannot release

information regarding that parent.

If we cannot locate the parent, we release the identifying information which is noted on the birth certificate about the parent.

Will you please advise us in writing if you do or do not want your identity released.

Your letter needs to contain information to verify that you are the birth mother. The type of information needed is your full name, date of birth and names of your parents. Or, if you remember the name and birthdate of the child this will be sufficient.

Please feel free to call me if I may be of assistance to you.

Sincerely,

/s/ Mary Alyce Lamb

Mary Alyce Lamb
Program Specialist

MAL:bg

EXHIBIT C

McGEHEE & GRUBB, P.C.
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
709 MARKET STREET
KNOXVILLE, TENNESSEE 37902
(615) 523-9191

November 23, 1988

Ms. Mary Alyce Lamb
Program Specialist
Department of Human Services
400 Deaderick Street
Citizens' Plaza Building
Nashville, Tennessee 37219

RE: **********
File No. DFM-730-1744

Dear Ms. Lamb,

Pursuant to my telephone conversation with you on Thursday, November 17, 1988, I wish to confirm by letter that my client, **********, does not wish to release any information to the Tennessee Department of Human Services regarding its inquiries of October 6 and 26, 1988. Due to the fact that the Department of Human Services is unable to release any information regarding the inquiry, ********** is reluctant to provide any information. This decision has been made

by ******** after great deliberation on her part.

It is also my understanding from our conversation that ******** may release the required information in the future, if she so desires. I have also related to ********** that if she desires to send a single letter to the individual making inquiry that she may do so while maintaining complete anonymity. Thank you for your assistance in this matter.

Very truly yours,

/s/ Daniel F. McGehee
Daniel F. McGehee

DFM/lh

cc: **********
Corr
1744

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. 3-96-0599
DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,	)	
Defendants.	)	

AFFIDAVIT

COMES NOW THE AFFIANT JANE DOE, and being first duly sworn, does hereby depose and say:

1. I am fifty-three years of age and reside in a small town in Tennessee. I am married.

2. Some thirty-one years ago, in 1966, I became pregnant out of wedlock. Living in a small town, in order to avoid public scrutiny and ridicule, my mother (the only person who was aware of my pregnancy) made arrangements for me to move to a home for unwed mothers in another part of the state. There I gave birth to a baby girl.

3. Within weeks after the birth of my daughter, I appeared before a Juvenile Court in Jackson, Tennessee, and there signed surrender documents with the State of Tennessee surrendering my parental rights so that this child could be placed for adoption.

4. It was my understanding based on the law at the time of my surrender in 1996, that my identity and the information surrounding the birth of my daughter would remain confidential. This was of my paramount importance to me due to the type of community where I resided, and the fact that mine was a large family.

5. Some twenty-seven years lapsed after the events surrounding the vents of m first child before I learned that the State of Tennessee had been contacted by someone seeking information as to identity and

whereabouts. In the meantime, I had remarried, and remain happily married, and my husband and I have children of our own. I have kept secret the fact of my first pregnancy and birth of a child from my entire family, with the exception of one of my sisters and my husband.

6. In June of 1993, however, my parents received a letter form the Department of Human Service inquiring as to my whereabouts and any other information about me. Attached hereto as Exhibit A is a true and correct copy of this letter.

7. Shortly thereafter another member of my family received an identical letter from the State of Tennessee.

8. Since no one in my family had any knowledge of my past situation, (with the exception of my sister and my husband), it was necessary for me to disguise the reason this information was being sought from the State.

9. Today I continue to reside in the same small town in rural Tennessee. Since 1993 I have lived with the fear that the details of this tragic episode of my life will be revealed to my family, my husband's family, our friends, church and community.

10. On February 20, 1997, the date of this affidavit, I visited the State Department of Children Services in Nashville, Tennessee, in an attempt to learn

what I could do to prevent my adoption file and the information surrounding this event in my past from being disclosed. I was advised that due to the recent change in Tennessee adoption law, and the lifting of the stay against this law, there was absolutely nothing I could do to prevent this information from being disclosed.

11. While I was advised that I could file a contact veto, I was assured that this would not prevent the release of my identity, or any of the records contained in my file. When I asked for a contact veto form, I was told that I would have to request this in writing before it could be provided.

12. If a stay of this adoption law is not granted, I and my family will suffer certain embarrassment, humiliation and mental anguish. Having kept this secret from my family and community these many years, disclosure of this information would be worse for me now than it would have been at the time the events occurred. I find it difficult to express in words the pain and the emotional suffering this infringement on my privacy this causes me. I respectfully urge this court to reinstate the stay which has been in effect throughout this case pending a final decision on whether this new law is constitutional.

Further affiant saith naught.

/s/ Jane Doe
JANE DOE

STATE OF TENNESSEE)
COUNTY OF WILLIAMSON)

Sworn to and subscribed before me this /s/ 20 day of /s/ February, 1997.

/s/ Larry Crain
Notary Public

My Commission Expires: /s/ 11-16-98

EXHIBIT A

STATE OF TENNESSEE
DEPARTMENT OF HUMAN SERVICES
400 DEADERICK STREET
CITIZENS PLAZA BUILDING
NASHVILLE, TN **** 37248-9000

June 15, 1993

Dear

We are presently looking for ******, birthdate *********.

We will appreciate your sharing with us her address and/or telephone number which would enable us to contact her. Any information about this person would be appreciated.

If you wish to contact me please feel free to do so at the above address or by telephone (615) ~~741-5938~~.

Thank you for your assistance in this matter.

Sincerely,

/s/ Sheryl Lager

~~Sheryl Lager~~
Program Specialist

SL:jf

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. ___
DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,	)	
Defendants.	)	

AFFIDAVIT

COME NOW, PROMISE DOE, and being first

duly sworn, does hereby deposed and state as follows:

1. That I am a twenty-four year old female resident of the Commonwealth of Kentucky, and do make this affidavit based on my own personal knowledge.

2. In July of 1990, when I was eighteen years of age, I discovered as a result of a visit to my family physician, that I was pregnant. I was also at that time enrolled as a student in college, and I knew that having a child would necessarily interrupt my ability to continue with my education.

3. As soon as I became aware of my pregnancy, I made an appointment and visited an abortion clinic for the purpose of terminating my pregnancy. After paying the necessary medical fees for this procedure, I learned through an ultrasound that my child was some seven and a half months in gestational age. As a result, I decided, based on my own sincerely held religious and conscientious beliefs that it would be wrong for me to go through with aborting my unborn child.

4. In the weeks following, I anguished over what was one of the most difficult decisions I have ever had to face in my life. I was unmarried at the time, and had long since ended by relationship with the natural father of my as yet unborn child. In fact, he had since become involved with someone else, and had gotten her pregnant as well. To this day the birth

father of my child does not know of my pregnancy or later delivery of his child. In addition, I was economically and financially unable to support a child at that time in my life, and was faced with having to go on welfare assistance if I carried the baby to term.

5. Through my parents I learned of Small World Ministries, Inc., a private adoption agency in Tennessee which was willing to offer assistance to me if I elected to surrender my child for adoption.

6. During the course of my adoption screening with Small World, I was required to furnish information relating to my personal background dating back to my early childhood. I addition, I was required to divulge information about the circumstances leading to my pregnancy, and the birth father of the child. I provided detailed information about my medical and family history.

7. In addition, I prepared a letter which was placed in my adoption file explaining in my own words the reasons for my decision to surrender my child for adoption. At the time I was advised that this would help me in my healing process and in putting this painful chapter of my life behind me. I never dreamed at the time I wrote this letter that it could someday be disclosed to my child or to his birth father, or to the adopting parents without my prior consent.

8. At the time I disclosed all of this private

information, I was assured that it would remain confidential and sealed under the laws of the State of Tennessee.

9. It is my sincere desire that the records contained in any file relating to my surrender and placement of my child for adoption remain sealed. I understand that under the provisions of the new Tennessee law that on July 1, 1996, these records must be made available upon proper request to my child's parents (meaning his natural father), as well as any sibling, or legal representative of my child. The possibility of this information getting into the hands of such individuals is greatly disturbing to me, and would surely cause me severe mental anguish, embarrassment and humiliation. I also consider this to be a significant invasion of my privacy, and an interference with my decision to surrender my child in the first place.

10. I am an adopted child, as are my mother and sister. Therefore, I believe that I can appreciate this issue from both perspectives.

11. I understand that had I decided to go through with an abortion, and terminate the life of my unborn child, all records relating to that decision and the procedure itself would be protected from disclosure to anyone without my consent. For the State of Tennessee to now retroactively its promise to keep the records of the surrender of my child for adoption confidential is, I believe, a form of

discrimination.

12. For the reasons stated herein, as well as those contained in the Memorandum of Law filed herein by my attorneys, I respectfully urge this Court to prevent this amendment in the Tennessee adoption law from taking effect on July 1, 1996.

Further affiant saith naught.

/s/Promise Doe
Promise Doe

STATE OF TENNESSEE)
COUNTY OF WILLIAMSON)

Sworn to and subscribed before me this /s/22 day of /s/ June, 1996.

/s/ Larry Crain
Notary Public

My Commission Expires: /s/ 11-16-96

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. ___
DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,	)	
Defendants.	)	

COME NOW, KIMBERLY C. and RUSS C. and being first duly sworn, do hereby depose and state as

follows:

1. We are citizens and residents of the State of Tennessee and do make this affidavit based on our own personal knowledge.

2. We are adoptive parents of two children, James C., age five years, and Zackary Lee C., age 15 months.

3. We have been married ten years, and have been unable to bear children. In December of 1990, I, KIMBERLY C. underwent a complete hysterectomy.

4. In the last three years, we have undergone two independent homestudies by two different private adoption agencies: Mid-Cumberland Children's Service and Small World Ministries, Inc.

5. As a part of the application to these two agencies to be considered for child placement we were required to disclose very personal and private information, included among these disclosures were the following types of information:

a) Psychological information relating to our current or past mental or emotional stability;

b) Financial information about our family's assets, liabilities and any sources of

income;

c) Details of our personal lives dating back to our childhood;

d) Information about our parents and family background;

e) Confidential information about our marriage relationship;

f) Medical information and records from our physicians;

6. At the time we disclosed this information to these adoption agencies we were assured that it would remain confidential, and that our adoption records would remained sealed.

7. Had he known at the time we adopted our most recent child that information about our identity and details of our personal lives could be discovered by Zackary's birth parents, siblings or legal representatives, we would have reconsidered our decision to accept this responsibility.

8. Zackary was born two months premature, and weighed only two pounds at birth. We have nursed this child from near death, and regard him for all intents and purposes as our own son. However, for the State of Tennessee to now retroactively rescind the projections afforded us when we decided to adopt this child, causes us great

concern, and poses a direct threat to our family's privacy.

9. Given the limited amount of information which we have about the birth parents of this child, we are most concerned about the prospect of Zackary's parents now gaining access to our adoption files.

10. For the reasons stated herein, as well as those contained in the Memorandum of Law filed herein by our attorneys, we respectfully urge this Court to prevent this amendment in the Tennessee adoption law from taking effect on July 1, 1996.

Further affiants saith naught.

We declare, under penalty of perjury, that the information contained in this affidavit is true and correct to the best of our information, knowledge and belief.

/s/Kimberly C.
Kimberly C.

/s/ Russ C.
Russ C.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PROMISE DOE, KIMBERLY C. and RUSS C., and SMALL WORLD MINISTRIES, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. ___
DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity; CHARLES W. BURSON, Attorney General of the State of Tennessee, in his official capacity; LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,	)	
Defendants.	)	

AFFIDAVIT

COMES NOW the affiant, JAMES SAVLEY, and

being duly sworn according to law, does hereby depose and say as follows:

1. I am a citizen and resident of Mt. Juliet, Wilson County, Tennessee, and do make this affidavit based on my own personal knowledge except where otherwise indicated.

2. I am the Executive Director of Small World Ministries, Inc., ("SMALL WORLD"), a non-profit ministry licensed by the State of Tennessee as a child-placing agency. SMALL WORLD has its principle office located at 401 Bonnaspring Dr., Hermitage, Tennessee, with branch offices in Laurel, New Jersey, and Bucharest, Romania, and with staff located in Riga, Latvia; Moscow, Russia; Tianjin, China; and Kiev, Ukraine.

3. Since its formation in 1985, SMALL WORLD has received for adoption placement approximately 111 children domestically and 120 children from birth parents in more than 4 countries around the world, including Romania, Latvia, Ukraine and Guatemala, as well as from several families here in the United States and the State of Tennessee. The vast majority of these children have been placed for adoption with families in the Middle Tennessee area.

4. As part of its placement responsibility, SMALL WORLD is required under the regulations of the Department of Human Services to conduct a very thorough, detailed investigation into the personal

background of each birth parent placing a child with this agency for adoption. In addition, SMALL WORLD acting pursuant to these state regulations, requires of each adopting parent who places a child with this agency that they disclose details surrounding their own personal and family history.

5. By illustration, and not limitation, the following are examples of the type of information which SMALL WORLD is required by law to obtain from the birth parents:

- Medical discharge and nursery care records
- Medical physical records
- Intake and case planning study
- Educational data
- Record of School Progress for child
- Narrative record of caseworker
- Psychological evaluation

6. In addition, the following are examples of the type of private information which SMALL WORLD is required to obtain from the adopting parents:

- Adoptive home study
- Marriage relationships and background
- Immunization records
- Medical records
- Adoptive home reference letters
- Supervisory visit reports
- Child sexual abuse background
- Educational records
- Documentation of Infertility

7. Birth parents who have furnished this information to SMALL WORLD have done so pursuant to a signed agreement assuring them that all such details of their personal and private backgrounds will be accorded the strictest degree of confidentiality. Attached hereto as Exhibit A is a true and correct copy of a sample placement agreement which SMALL WORLD uses with parents placing their children with this ministry for placement and adoption.

8. In the course of its operation SMALL WORLD has received several children for adoption from birth parents who have been the victims of crimes of violence, child abuse, narcotics and drug

abuse, and even rape and incest. These birth parents were faced with extremely difficult choices of whether to place their child with this agency or to terminate their pregnancy through abortion. In many instances their decision to forego an abortion of their unborn child was based in large part on the assurance that their identity and the details of their personal background would remain strictly confidential and secure from public disclosure. In addition, quite often this information is obtained from these individuals at a time in their lives when they are undergoing severe emotional depression or anguish over the decision of what do to with their child. Many of them will be subjected to even greater risk to their emotional health knowing that the information of the most private details of their lives would someday be open to disclosure as allowed in the new amendment.

9. Since it first began operation, all of the information obtained by SMALL WORLD from either birth parents or adopting parents under this promise of confidentiality has been provided to the State Department of Human Services, as required by law, and, until July 1, 1996, was protected from disclosure under the provisions of Tenn. Code Ann. § 36-1-129.

10. Under the provisions of Tenn. Code Ann. § 36-1-127(c), 1995 Public Acts Chapter 532, commencing on July 1, 1996, SMALL WORLD will be required to divulge any adoption records in its offices to any adopted person twenty-one (21) years of age or older or such person's legal representative, the

person's parents, and the person's siblings, or lineal descendants who are twenty-one (21) years of age or older, or the legal representatives of such person, subject only to certain narrow restrictions.

11. As a practical matter this amendment in the adoption law will mean that any person born in 1975 or earlier, and who was placed or referred for adoption, will have the right to demand access to any filed or documents retained pertaining to his or her adoption, including the detailed personal and private histories of the birth parents and the adopting parents.

12. The 1995 amendment to Tennessee's adoption law regarding release of confidential information poses a significant burden on birth parents in the exercise of their right of procreational privacy, and directly impacts their decisions involving those rights. Already, SMALL WORLD has encountered several birth parents who have expressed concern that if the information they are required to provide in order to place their child for adoption is not protected as to its confidentiality, they would rather opt to abort their child than place it for adoption.

13. In addition, by removing the protections afforded to adopting parents under the prior law, the amendment codified at Tenn. Code. Ann § 36-1-127(c) presents a burden to prospective adoption parents in the exercise of their parental privacy rights.

Specifically, these parents must now make a difficult choice of whether to adopt faced with the knowledge that the most private details of their personal and family backgrounds will be open for disclosure.

14. Based on my experience over the last 20 years for in counseling with individuals and families considering whether to place their child for adoption, or whether to adopt a child, these parents are presented with some of the most difficult questions they will ever have to face. By taking back its assurance to these individuals and families that information divulged by them of the most private nature, and at a time when they are most valuable, will no longer be kept confidential, the State has reneged on a significant promise of maintaining this confidentiality.

Therefore, SMALL WORLD requests that on behalf of the several hundred families and individuals impacted by this new amendment that this Court declare it to be in violation of their constitutionally protected rights.

Further affiant saith naught.

/s/James Savley
Promise Doe

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me this /s/24 day of /s/ June, 1996.

/s/ Larry Crain
Notary Public

My Commission Expires: /s/ 11-16-96